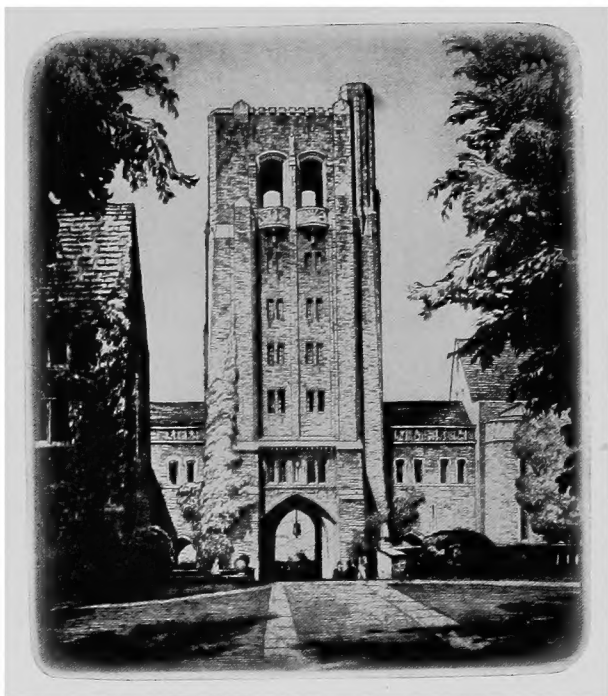


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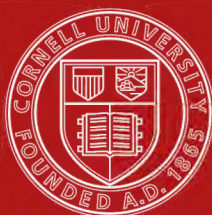
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A TREATISE
ON THE
LAW OF CARRIERS

VOLUME ONE

A TREATISE ON THE LAW OF CARRIERS

AS ADMINISTERED BY THE COURTS OF THE UNITED STATES,
CANADA AND ENGLAND, COVERING THE PRINCIPLES AND
RULES APPLICABLE TO CARRIERS OF GOODS, PASSENGERS,
LIVE STOCK, COMMON CARRIERS, CONNECTING CAR-
RIERS, AND INTERSTATE AND INTERNATIONAL
TRANSPORTATION BY LAND AND WATER,
AND THE METHODS AND PROCEDURE FOR
THEIR ENFORCEMENT, FURNISHING A
PRACTICAL GUIDE TO LITIGANTS IN
THE JURISDICTIONS NAMED, AND
INCLUDING THE TEXT OF

THE ACT TO REGULATE COMMERCE
AS AMENDED

AND ALL ACTS SUPPLEMENTARY THERETO

REVISED TO JANUARY 1, 1914

By DEWITT C. MOORE

Of the Johnstown, New York, Bar; Author of "The Law of Fraudulent Conveyances."

SECOND EDITION

IN THREE VOLUMES

VOLUME I



ALBANY N. Y.
MATTHEW BENDER & COMPANY
1914

B. 3726

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PREFACE TO SECOND EDITION.

The fundamental principles of the law of carriers have long been firmly established in jurisprudence. But the changed conditions of modern life and progress have made essential important modifications and limitations upon the liability of the common carrier which have found expression in judicial decisions and statutory enactments. The law of carriers in its actual operation, touching and regulating, as it now does, transportation by modes and means formerly unknown and under circumstances and conditions hardly conceivable to the fathers of the law, has become so broad and comprehensive, and the cases to which it has been applied have become so multitudinous and of such infinite variety, that the author of these volumes necessarily could not have covered the entire field of the law on this subject in the one volume prepared by him and published in 1906, and it is scarcely to be expected that he has succeeded in accomplishing so great an undertaking in the three volumes now presented.

An effort has been made, however, to widen the scope of the work and add to its usefulness to the profession. The chapters of the first edition have been revised and amplified and brought down to date by the later decisions, and new chapters, treating of new topics of great and growing present interest and importance, have been added.

It has been the aim of the writer not only to present to his brethern in an engrossing profession the latest cases in the various jurisdictions but also to show the reason, source, and foundation of the principles and rules set forth and the authorities by which they have been established and are maintained. He has aimed to show the present law and the specific rules applicable in a multitude of cases, in an orderly arranged, concise form, easily accessible and readily adaptable to the use of the practitioner.

Comprehensive tables of contents and chapter headings, a copious general index covering both text and notes, an appendix giving the text of the Act to Regulate Commerce, as amended, and Acts

PREFACE TO SECOND EDITION.

Supplementary thereto, as revised to January 1, 1914, carefully indexed, and a complete table of cases cited, make the contents readily available for expeditious use.

The writer avails himself of this opportunity to express his deep appreciation of the favorable reception accorded by the profession to the first edition.

It has been said that that writer does the most who gives his reader the most knowledge and takes from him the least time. Continuing in the exercise of the privilege which a preface allows to an author to speak of himself, it may be said, in addition to what has already been said, that it has taken more time and labor to abridge these pages than to write them and that the work contains that which is the result of much reading, study, and reflection, and painstaking, diligent application. The writer, like all others, is better qualified to speak of the pains that his efforts have cost him than any one who may make use of his work can possibly be; but to what purpose he has devoted his labors is a question upon which his readers would not regard it as within the limits of privilege or propriety for him to express an opinion. The utility of the results attained must be the test of their value to the profession.

In the hope and confident belief that, even though there may be found some phases of the subject under consideration which have not been presented, or, if presented, not exhaustively covered, the work will be found to amply and accurately give the law upon all matters considered within its pages, the work is respectfully submitted.

Johnstown, N. Y., April 4, 1914.

DEWITT C. MOORE.

PREFACE TO FIRST EDITION.

The author of this volume performed the greater portion of the work necessary to the preparation of Nellis' "Street Railroad Accident Law," published in May, 1904, and was generously accorded the credit therefor by the author of that work in the preface to that volume. The favorable manner in which that publication was received by the profession led him to undertake the more laborious task of preparing this volume covering the broader field of "The Law of Carriers."

The public interest in questions concerning the rights, duties, and liabilities of common carriers in their relations to shippers and travelers, and their regulation by statutory enactments, and the increasing litigation over questions growing out of such relations, seemed to render the subject a timely one. The multitude of cases demonstrates how important and far-reaching the subject has become, and how laborious was the task involved of presenting this mass of decisions and precedents in practicable form for professional use.

It has been the chief aim of the author to furnish suitors with a practical guide in this class of litigation by as full a presentation as possible of the established principles and rules governing the various and varying phases in which controverted questions have been and may be presented for judicial adjustment. The decisions and rulings in different jurisdictions, and the reasons therefor, so far as practicable, have been set forth, and the latest as well as the earliest authorities in the different States are cited and conveniently arranged.

A chapter is devoted to Interstate Transportation, giving the decisions of the courts upon the principal questions arising in the course of the administration of the Interstate Commerce Act of 1887, and the amendments thereto. These decisions forecast to a considerable extent the probable construction that will be given by the courts to many of the provisions of the recent Act of Congress, known as the Railroad Rate Act. The full text of the new law is

PREFACE.

given, with its many important and in many respects radical changes. The principal purposes and objects of that law are set forth, but only when the law is in actual operation can it be determined whether it will prove as effective and beneficial as those who are responsible for the legislation have urged and insisted that it would be.

In the confident belief that the work will be well received and serve a useful purpose to the profession, which will amply repay the author for the care and labor conscientiously bestowed upon it, and that its accuracy of statement and authority will be found to be what the author has aimed to make it, the volume is submitted to the consideration of the profession.

DEWITT C. MOORE.

Johnstown, N. Y., June 2, 1906.

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THE LAW OF CARRIERS.

CHAPTER I.

CARRIERS GENERALLY.

- SECTION**
1. Carrier defined.
 2. Classes of carriers.
 3. Carriage of goods a bailment.
 4. Private carriers.
 5. Duties and liabilities of private carriers.
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 10. Private carriers for hire.
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§ 1. Carrier defined.

A carrier has been defined to be one who undertakes to transport goods from one place to another.¹ But a more accurate and comprehensive definition, perhaps, would be that a carrier is a person or corporation who undertakes to transport or convey goods, or property, or persons, from one place to another, gratuitously or for hire.

§ 2. Classes of carriers.

Carriers have been divided into two classes: private or special carriers, and common or public carriers.² Another classification

1. Bouvier's L. Dict. Vol. 1, 242; Parsons, Contr. Vol. 1, 642:

2. Allen v. Sackrider, 37 N. Y. 341; Brown v. New York Cent., etc., R. Co., 75 Hun (N. Y.), 355, 27 N. Y. Supp. 69; O'Rourke v. Bates, 133 N. Y.

Supp. 392, 73 Misc. Rep. 414; Varble v. Bigley, 14 Bush. (Ky.) 698, 20 Am. Rep. 435; Verner v. Sweitzer, 32 Pa. St. 208; Bouvr. L. Dict. 242; Story Bailm. § 495; 6 Cyc. 364.

recognizes three classes; carriers without hire, carriers for hire but not common carriers, and common carriers; or carriers without hire or reward, private carriers for hire, and common or public carriers for hire.³ As all carriers without hire may be said to be private carriers, since common carriers when they carry gratuitously become in fact private carriers as to the particular goods or transaction, the classification of carriers into private carriers without hire, private carriers for hire, and common carriers, seems to best express the differences in character and liability which distinguish them. The classification of carriers is important because it enters largely into the determination of the legal responsibility of the carrier. The class among carriers to which a particular carrier is to be assigned depends upon the nature of his business, the character in which he holds himself out to the public, the terms of his contract, and his relations generally to the parties with whom he deals and the public. The above classifications include carriers by land and by water, as well as carriers of goods, carriers of passengers, and carriers of live stock, and the liability of the carrier is also to a considerable extent determined from or affected by whichever of these latter classes he belongs to.

§ 3. Carriage of goods a bailment.

The carriage of goods or the baggage of a passenger is a bailment, the goods or baggage being delivered to the carrier on a condition, express or implied, for the purpose of carriage to their destination and delivery according to the directions of the consignor or owner. The carriage of goods or baggage, when it is gratuitous or without compensation to the carrier, belongs to that class of bailments known as mandates, a species of bailment where the bailee receives goods, and without reward undertakes to do some act about them, or simply to carry them from place to place.⁴ The carriage of goods or baggage, where the carrier is paid for the service, is of that class of bailments known as a hiring, which is a bailment of goods always for a reward, and among which bail-

3. Amer. & Eng. Ency. of Law, 1st ed., Vol. 2, p. 771; Hutch. Carr. § 15.

4. See § 6, *post*; Edwards, Bailm. § 3.

ments is the hire of carriage.⁵ Private carriers, whether without hire or for hire, are strictly bailees and assume simply the duties and liabilities of bailees. Their responsibility does not necessarily arise from an undertaking to carry and is determined by the rules governing the responsibility of bailees. The foundation of the bailee's liability, except in the case of common carriers of goods and innkeepers, is negligence, and negligence in some degree must be shown to make the bailee liable. But the liability of the common carrier of goods, like that of the innkeeper, is extraordinary and exceptional, and is based upon reasons of public policy, and not upon the contract of bailment, although the liability cannot exist without the bailment. The common carrier of goods is an insurer of the safety of the goods and the question of negligence, as will be hereafter seen, ordinarily does not enter into the determination of his liability.⁶ But the question of negligence does arise when he seeks to avail himself of any of the exceptions which the law allows, or his contract makes, to his general liability as an insurer, and it is charged that but for his negligence the loss would not have occurred. And the liability of a common carrier of passengers for an injury to a passenger generally depends exclusively upon the question of negligence.⁷ The law as to the liability of bailees in general for negligence, adverted to in a subsequent section, thus frequently furnishes the rule by which the common carrier as well as other bailees are held responsible for negligence. But while the liability of all those carriers whose liability depends entirely upon negligence is determined by the general law of bailments, that law, not admitting the responsibility of the bailee when loss or injury has occurred without negligence, has generally but little application to the liability of common carriers of goods, who are held to be insurers against all accidents not attributable directly to the acts of God or of the public enemy.

§ 4. Private carriers.

A private carrier is one who agrees, by special agreement or contract, to transport persons or property from one place to an-

5. See § 10, *post*; Edwards, Bailm.

6. See Chap. II, § 1.

§ 3.

7. See Carriers of Passengers.

other, either gratuitously or for hire; one who undertakes for the transportation in a particular instance only, not making it a vocation, nor holding himself out to the public ready to act for all who desire his services.⁸ Common carriers, however, hold themselves out to carry for all persons indiscriminately.⁹ Private or special carriers are not subject to the exceptional or extraordinary duties and liabilities of common carriers. They are not bound by virtue of their employment or vocation to receive and carry all persons or the goods of all who apply to them, but they may carry for whom they choose and for such compensation and at such times as they may fix or as may be agreed upon. They are not in any sense public servants like common carriers. But they may by special contract assume the duties of common or public carriers and thus make themselves liable as common carriers.

§ 5. Duties and liabilities of private carriers.

Private carriers, whether carriers without hire or carriers for hire, as has been stated, are strictly bailees, in no way distinguishable from ordinary bailees as to their responsibility, and are subject only to the duties and liabilities of bailees, and their liability is determined by the degree of negligence of which they are guilty.¹⁰ The principles of the law as to the liabilities of bailees in general for negligence which form a part of the law of bailments, are applicable in determining the liability of private carriers. These principles or rules may be stated as follows: When the bailment is for the sole benefit of the bailor, the law requires only slight diligence on the part of the bailee, and holds him liable only for gross negligence. When the bailment is for the sole benefit of the bailee, the law requires great diligence on his part, and holds him liable for slight negligence. When the bailment is, or is intended to be, reciprocally beneficial to both parties, the law requires ordinary diligence on the part of the bailee, and holds him liable for ordinary negligence.¹¹

8. §§ 6, 10, *post*.

9. See Common Carriers.

10. § 3, *ante*; *Allen v. Sackrider*, 37 N. Y. 341; *Fish v. Clark*, 49 N. Y. 122, 2 *Lans.* (N. Y.) 176.

11. *Angell, Carrs.* (5th ed.) § 11; *Hutch. Carrs.* § 8; *Amer. & Eng. Ency. of Law* (1st ed.), Vol. 2, p. 772.

§ 6. Private carriers without hire.

Carriers who carry goods gratuitously, without any compensation directly or indirectly, are liable as gratuitous bailees or mandataries only.¹² It was formerly held that such carriers were only liable for gross negligence and required to exercise only slight care and diligence.¹³ But all distinctions in the degrees of negli-

12. *Citizens' Bank v. Nantucket Steamboat Co.*, 2 Story (U. S.) 16; *Pender v. Robbins*, 6 Jones L. (N. C.) 207; *Coggs v. Bernard*, 2 Ld. Raym. 909, 1 Smith's L. Cas. 199; *Hutton v. Osborne*, 1 Sel. N. P. 420; *Mobile, etc., R. Co. v. Hopkins*, 41 Ala. 486, 94 Am. Dec. 607; *Robinson v. Threadgill*, 13 Ired. L. (N. C.) 39.

13. *Coggs v. Bernard*, 2 Ld. Raym. 909, 1 Smith's L. Cas. 199; *Hutton v. Osborne*, 1 Sel. N. P. 420; *Colyar v. Taylor*, 1 Coldw. (Tenn.) 372, where T. gratuitously undertook to receive \$1,500 for C. at N., and deliver it to him at W., where they both resided, and, after drawing the money went to a public fair, where he met E., a townsman, who was going home before he was, and, stepping a little aside from the crowd, gave E. the money to carry to C., and, on his way home in a crowded car, E. had his pocket picked of the money, T. was held liable for the loss, as he had violated his trust and was guilty of a conversion of the property, and of gross negligence.

Kirtland v. Montgomery, 1 Swan (Tenn.), 457, wherein it was said: "As a general rule, a mandatary whose engagement is merely gratuitous, is bound to *ordinary* diligence and liable only for gross neglect or breach of good faith. It is, however, a well settled rule that if a mandatary enter upon the execution of business submitted to him, he is bound to use a degree of diligence and at-

tention adequate to the performance of his undertaking; if he do not, and damage ensue, he is liable as a mandatary for his misfeasance."

In *Jenkins v. Motlow*, 1 Sneed. (Tenn.) 253, 60 Am. Dec. 154, the court, referring to this extract, said: "The word 'ordinary' in this extract is not technical or correct, but the rule as to the liability of a gratuitous bailee is clearly and truly stated."

A mere mandatary is liable only for gross negligence. *Stanton v. Bell*, 2 Hawks (N. C.), 145; *Sodowsky v. McFarland*, 3 Dana (Ky.), 295; *Tracy v. Wood*, 3 Mason (U. S.), 132; *Tompkins v. Saltmarsh*, 14 S. & R. (Pa.) 275; *Bland v. Womack*, 2 Murph. (N. C.) 373; *Beardslee v. Richardson*, 11 Wend. (N. Y.) 25; *Anderson v. Foresman*, Wright (Ohio), 598.

Gross negligence, in such case, is the omission of that care which bailees without hire, or other mandataries, of common prudence, are accustomed to take of property of the like kind. Money requires more care than common articles of property. *Tracy v. Wood*, 3 Mason (U. S.), 132; *Anderson v. Foresman*, Wright (Ohio), 598; *Bland v. Womack*, 2 Murph. (N. C.) 373.

Carrier not liable. Where gold dust was taken on board the steamer *New World* to be carried gratuitously from Sacramento to San Francisco, the clerk of the boat having

gence are now generally regarded by the courts as unimportant and as impracticable in determining liability for negligence."

given the owners of the dust actual notice that he would receive gold dust or money only on condition that no charge should be made and no responsibility incurred, and the gold dust was stolen from the boat without any negligence on the part of its officers, the owners of the boat were held not liable for the loss. *Fay v. Steamer New World*, 1 Cal. 348.

14. *Perkins v. New York Cent. R. Co.*, 24 N. Y. 196, 82 Am. Dec. 282, wherein the court said: "The difficulty of defining gross negligence and the intrinsic uncertainty pertaining to the question as one of law, and the other impracticability of establishing any precise rule on the subject, renders it unsafe to base any legal decision on distinctions of the degrees of negligence." *Smith v. New York Cent. R. Co.*, 24 N. Y. 222; *Nellis' St. Rd. Acct. Law*, pp. 22, 23.

The same view has been taken in other states:

Ala.—*Stringer v. Alabama R. Co.*, 99 Ala. 397, 13 So. 75.

Colo.—*Denver, etc., R. Co. v. Peterson (Colo.)*, 69 Pac. 578.

Me.—*Storer v. Gowen*, 18 Me. 177.

Mass.—*Lane v. Boston, etc., R. Co.*, 112 Mass. 455, 22 Am. L. Reg. N. S. 126, note.

Mo.—*McPheeters v. Hannibal, etc., R. Co.*, 45 Mo. 22.

N. H.—*State v. Boston, etc., R. Co.*, 58 N. H. 410.

N. C.—*McAdoo v. Richmond, etc., R. Co.*, 105 N. C. 140.

Tenn.—*Mariner v. Smith*, 5 Heisk. (Tenn.) 208.

Vt.—*Briggs v. Taylor*, 28 Vt. 180.

The doctrine has also been criti-

cised in the United States courts and in England.

U. S.—*The Steamboat New World v. King*, 16 How. (U. S.) 474; *Milwaukee, etc., R. Co. v. Arms*, 91 U. S. 494; *New York Cent. R. Co. v. Lockwood*, 17 Wall. (U. S.) 357; *Holladay v. Kennard*, 12 Wall. (U. S.) 254; *Purple v. Union Pac. R. Co.*, 114 Fed. 123, 51 C. C. A. 564, 57 L. R. A. 700, the words "gross" and "reckless," as applied to negligence *per se*, have no legal significance which imports other than simple negligence or want of due care, and are not the equivalent of "willful" or "wanton."

Eng.—*Hinton v. Dibbin*, 2 Ad. & El. N. S. 661, 42 E. C. L. 847, 2 Q. B. 646, 2 G. & D. 36, 6 Jur. 601, "it may well be doubted whether between gross negligence and negligence merely any intelligible distinction exists." *Grill v. General Iron Screw Collier Co.*, L. R. 1 C. P. 612; *Beal v. South Devon R. Co.*, 3 H. & C. 341; *Wyld v. Pickford*, 2 M. & W. 443; *Wilson v. Brett*, 11 M. & W. 113; *Armistead v. Wilde*, 17 Q. B. 261, 71 E. C. L. 261; *Austin v. Manchester, etc., R. Co.*, 10 C. B. 454, 79 E. C. L. 454, 11 Eng. L. & Eq. 512.

Any negligence is gross in one who undertakes a duty and fails to perform it. The term "gross negligence" is applied to the case of a gratuitous bailee, who is not liable unless he fails to exercise the degree of skill which he possesses. *Lord v. Midland R. Co.*, L. R. 2 C. P. 339; *Cashill v. Wright*, 6 El. & Bl. 891, 88 E. C. L. 891; *Giblin v. McMullen*, L. R. 2 P. C. 317.

Although a person undertaking gratuitously to perform an act with respect to the property of another is not bound by his undertaking,¹⁵ yet if the act is performed he will be held responsible for any injury resulting from a want of due care.¹⁶ What is gross negligence or slight negligence can only be determined by the circumstances of a given case, and gross negligence is not shown where the evidence is that reasonable and proper care was exercised.¹⁷ Negligence is essentially always a question of fact and its determination depends necessarily upon the particular circumstances in each case. The private carrier without hire is bound to use proper and reasonable care for the safety of the goods committed to his charge, and the test of what is such proper and reasonable care seems to be that which a man of ordinary prudence would have used under the particular circumstances. The test must be applied with reference to the article, the nature of the trust, and the circumstances attending its execution, and thus applied what would be reasonable and proper care in the case of a private carrier without hire may not be the same measure of care required of a private carrier for hire.¹⁸ If a person who has undertaken to carry goods gratuitously takes the same care of the goods intrusted to him as of his own, he is not liable, if loss ensues, but he is responsible for a loss resulting from a want of such care.¹⁹

§ 7. When transportation is gratuitous.

In order to determine the question of negligence it is frequently

15. *Thorne v. Deas*, 4 Johns. (N. Y.) 84; *McGee v. Bast*, 6 J. J. Marsh (Ky.), 455.

16. *Melbourne v. Louisville, etc.*, R. Co., 88 Ala. 443, 6 So. 762.

17. *Louisville, etc., R. Co. v. Gerson*, 102 Ala. 499, 14 So. 873.

Gross negligence. A carrier, without compensation, was held liable on the ground of gross negligence, because he had deposited the goods in a place which was peculiarly unsafe at the time, by reason of an anticipated raid of hostile troops. *Adams Exp. Co. v. Cressop*, 6 Bush. (Ky.) 572. But, where the transportation

was not gratuitous and the goods were deposited under such circumstances as showed the exercise of reasonable care as bailee by the defendant, after the termination of its liability as a carrier, it was held not liable. *Adams Exp. Co. v. Darnell*, 31 Ind. 20, 99 Am. Dec. 582; *Howard Exp. Co. v. Wile*, 64 Pa. St. 201.

18. *Philadelphia, etc., R. Co. v. Derby*, 14 How. (U. S.) 468; *Treleven v. Northern Pac. R. Co.*, 89 Wis. 598; *Coggs v. Bernard*, 2 Ld. Raym. 909, 1 Smith's L. Cas. 199.

19. *Anderson v. Foresman, Wright* (Ohio), 598.

necessary to determine in the first instance whether or not the transportation was actually gratuitous. Where the carrier receives goods, to be carried to a certain place, and there sold in the usual course of business for the ordinary freight,²⁰ or for a certain freight,^{20a} or goods, in the usual course of business, are shipped on freight, consigned to the carrier for sale and returns,^{20b} the carrier is liable as well for the payment of the proceeds or to account for the goods to the shipper as for the safe carriage of the goods. Whether the return cargo is in money or in goods the freight of the cargo is compensation for the whole. So, a person traveling on a train in charge of cattle which are being shipped, is not a gratuitous passenger, but a passenger for hire; the consideration for his passage is the service he renders in taking care of the cattle, or it is found in the charges made for shipping the cattle.²¹ Proof of the usage of the clerks of steamboats to receive and carry packages from one port to another, without hire, in the expectation that the boat would be preferred by the parties for the shipment of freight, is insufficient to bind the owners, as carriers, because no certain or fixed standard of remuneration is shown, nor that the consignee of the package would be liable to make any return for the risk and labor incurred; and because it is not shown that such usage had grown up with the consent of the owners of vessels, or that it was more than a mere accommodation usage.²² A railroad company which contracts for the trans-

20. *Kemp v. Coughtry*, 11 Johns. (N. Y.) 107, it appearing that it was a part of the duty of the carrier, and in the usual course of employment, to sell the goods and bring back the money where no special instructions were given.

20a. *Harrington v. McShane*, 2 Watts (Pa.), 443, 27 Am. Dec. 321, wherein the owners of a steamboat were held, under the usage of the Western waters, to act as common carriers, both in the selling of the produce and in bringing back the money, and therefore liable for the loss of the goods by fire.

20b. *Moseley v. Lord*, 2 Conn. 389, where the master of a vessel gave a bill of lading with the assent of the

owner of the vessel; *Emery v. HERSHEY*, 4 Me. 407, 16 Am. Dec. 268.

21. *Missouri Pac. R. Co. v. Ivey*, 71 Tex. 409, 9 S. W. 346, 1 L. R. A. 500, 10 Am. St. Rep. 758; *Pennsylvania R. Co. v. Henderson*, 51 Pa. St. 315; *Cleveland, etc., R. Co. v. Curran*, 19 Ohio St. 1, 2 Am. Rep. 362; *Ohio, etc., R. Co. v. Nickless*, 71 Ind. 271.

22. *Cincinnati & L. Mail Line Co. v. Boal*, 15 Ind. 345; *Whitmore v. The Caroline*, 20 Mo. 513, the owners of a steamboat are not liable for the loss of money intrusted to the clerk by a passenger, unless a known and established usage for a steamboat to carry money for hire, on account of the owners, is shown; *Chouteau v.*

portation of the tanks of an oil company, and their return, when emptied, is subject to the liabilities of a common carrier with respect to the return of the empty tanks, though no bill of lading is furnished therefor, nor any additional compensation paid, independently of the freight for the transportation of the oil.²³ Likewise, where the undertaking of a carrier is that persons sending grain over the route are entitled to have the empty bags returned without charge for freight, this is not to be deemed a gratuitous bailment, so as to exempt the carrier from liability for loss of the bags except that arising from gross negligence. The freight paid on the full bags is a consideration both for the transportation of the full bags and the return of the empty ones.²⁴

§ 8. When compensation may be implied.

The fact that a carrier did not intend to charge for the transportation of a certain chattel, but meant to carry it gratuitously, if not communicated to the owner, does not render the bailment a gratuitous one so as to exempt him from loss, except for gross negligence. Delivery of property to a common carrier, for transportation, raises an implied obligation to pay freight, and renders the carrier liable accordingly, unless the contrary is agreed upon. No express agreement having been made as to compensation, the carrier is entitled to it if he choose to demand it.²⁵ It is not nec-

The *St. Anthony*, 16 Mo. 216, proof of a custom by boats to carry money for customers to gain patronage does not establish a custom to carry it for hire. See *Rogers v. Head*, Cro. Jac. 262, where it was held when plaintiff had undertaken with defendant "reasonably to content him for the carriage," the latter was liable as a private carrier for hire, although there was no proof of a specific compensation having been paid him.

23. *Spears v. Lake Shore, etc., R. Co.*, 67 Barb. (N. Y.) 513; *Mallory v. Tioga R. Co.*, 32 How. Pr. (N. Y.) 616, affg. 39 Barb. (N. Y.) 488.

24. *Pierce v. Milwaukee, etc., R. Co.*, 23 Wis. 387; *Aldridge v. Great Western R. Co.*, 15 C. B. N. S. 582, 109 E. C. L. 582. Compare *Jenkins*

v. Motlow, 1 Sneed. (Tenn.) 248, cited under § 6, where the deposit of money by a passenger, for the carriage of which no extra charge was made, was held to render the carrier liable to plaintiff only as a mandatary or depository, having failed to use *ordinary* diligence under the circumstances. This case would seem to be analogous to those cited in the text and the carrier to be liable as a common carrier as to the money as he is of the passenger's baggage, the price paid for the passage being also the hire for the carriage of whatever the passenger commits to the custody of the carrier.

25. *Gray v. Missouri Riv. Packet Co.*, 64 Mo. 47; *Kirtland v. Montgomery*, 1 Swan (Tenn.), 452.

essary to constitute one a common carrier that a stipulation should be entered into as to the amount of freight to be paid. But unless a right to compensation exists, the common law liability of a common carrier is not created, though there may be the responsibility of a mandatary incurred.²⁶ Though there be no stipulated price for the service, yet if the usage in such cases implies an agreement to pay the carrier for such service, he will be liable as a common carrier.²⁷

§ 9. Proof of negligence.

A private carrier without hire is a mandatary or bailee without reward and is liable in all cases for gross negligence only, and this must be proved against him. If he fails to deliver the goods according to his undertaking, in order to make him liable for the loss, proof must be made of a demand and refusal, or that the property was lost by the carrier's negligence.²⁸ It then devolves upon the carrier to account for the loss by showing that it occurred under circumstances such as to relieve him from liability.²⁹ The statements made by the carrier at the time of the demand and

26. *Knox v. Rives*, 14 Ala. 249, 48 Am. Dec. 97. The owner of a private ferry, although on a road not opened by public authority, or repaired by public labor, may so use it as to subject himself to the liability of a common carrier, if he undertakes, for hire, to convey across the river all persons indifferently, with their carriages and goods; but this is a question for the jury. *Littlejohn v. Jones*, 2 McMull. (S. C.) 365, 39 Am. Dec. 132.

27. *Kirtland v. Montgomery*, 1 Swan (Tenn.), 452.

28. *Beardslee v. Richardson*, 11 Wend. (N. Y.) 25, 25 Am. Dec. 596; *Lampley v. Scott*, 24 Miss. 528. If the goods be taken from him by one having paramount title, he is discharged. *Edson v. Weston*, 7 Cow. (N. Y.) 278; *Beardslee v. Richardson*, *supra*.

29. *Beardslee v. Richardson*,

supra; *Darling v. Younker*, 37 Ohio St. 493, 41 Am. Rep. 532. A bailor who entrusts his goods, knowing how and where the bailee will keep them, assents to such keeping, and can maintain no action for their loss. *Knowles v. Atlantic, etc., R. Co.*, 38 Me. 55, 61 Am. Dec. 234.

A person who undertakes, without reward, to sell and dispose of the property of another in the same manner as though it was his own, is liable for gross negligence, such as will imply fraud, and is not bound, under such a contract, "to dispose of the same as a prudent man would of his own." *McLean v. Rutherford*, 8 Mo. 109.

A bailee acting gratuitously in carrying money, which is lost, while other money, which is his own, is not lost, is liable for the loss. *Biand v. Womack*, 2 Murph. (N. C.) 373.

A bailee, without reward, who has

refusal to deliver the property, in which he gives an account of the loss by accident, or theft, with the attendant circumstances, are part of the *res gestae*, and admissible as evidence in his favor.³⁰

§ 10. Private carriers for hire.

A private carrier for hire is one who, without being engaged in such business as a public employment, undertakes to carry and deliver goods in a particular case, for hire or reward.³¹ A private carrier for hire is one who acts in a particular case for hire or reward.^{31a} One who is the owner of a vessel, and who is especially employed to transport a cargo of grain, is not a common or public carrier, but only a private carrier for hire.³² All persons who carry under a special contract, as the driver of a stagecoach, occasionally taking packages to carry for compensation, are private

used money with which he is intrusted, and is afterwards robbed of other money, must bear the loss. *Anderson v. Foresman*, Wright (Ohio), 598.

If the bailee "keeps the goods bailed to him, but as he keeps his own, though he keeps his own negligently, yet he is not chargeable for them, for the keeping of them as he keeps his own is an argument of his honesty." *Coggs v. Bernard*, 2 Ld. Raym. 909, 1 Smith's L. Cas. 199. *Compare Doorman v. Jenkins*, 2 Ad. & El. 256, 29 E. C. L. 80; *Rooth v. Wilson*, 1 B. & Ald. 59.

30. *Lampley v. Scott*, 24 Miss. 528; *Tompkins v. Saltmarsh*, 14 S. & R. (Pa.) 275. "That a person robbed instantly states the fact, institutes a search, and prosecutes the offender, are circumstances for the jury. It would be difficult to establish such facts except by the attending circumstances. Such evidence is competent, as it would be for the plaintiff to show that at the time of the alleged robbery the defendant re-

mained silent, neither instituting search or prosecution." *Anderson v. Foresman*, Wright (Ohio), 598.

31. *Penniwill v. Cullen*, 5 Harr. (Del.) 238; *Self v. Dunn*, 42 Ga. 528, 5 Am. Rep. 544; *Littlejohn v. Jones*, 2 McMull. L. (S. C.) 366, 39 Am. Dec. 132; *Sheldon v. Robinson*, 7 N. H. 157, 26 Am. Dec. 726; *Samms v. Stewart*, 20 Ohio 69, 55 Am. Dec. 445; *Moriarty v. Harn-den's Express*, 1 Daly (N. Y.) 227; *Rogers v. Head*, Cro. Jac. 262. One who is employed for hire *pro hac vice* only, and does not make the carriage of goods his constant employment, is not liable as a common carrier. *Anon. v. Jackson*, 1 Hayw. (N. C.) 14; *Satterlee v. Groat*, 1 Wend. (N. Y.) 272.

31a. *Jackson Architectural Iron Works v. Hurlbut*, 158 N. Y. 34, 52 N. E. 665, 70 Am. St. Rep. 432; *Fish v. Clark*, 49 N. Y. 122; *O'Rourke v. Bates*, 133 N. Y. Supp. 392, 73 Misc. Rep. 414.

32. *Allen v. Sackrider*, 37 N. Y. 341.

carriers.³³ One who is employed to tear down a house for another and deliver the brick and lumber at another place is simply a private carrier for hire.^{33a} One who contracts to cut timber, and transport it to the place where it is to be delivered and used, does not incur the responsibility of a common carrier, but is only liable as a private carrier for the want of ordinary prudence, care and skill.³⁴ If the carrier holds himself out to the public generally as ready and willing to carry any goods that may be shipped, he is liable as a common carrier;³⁵ but if he only proposes to carry the goods of particular persons, he cannot be held liable as a common carrier to a third person, with whom his servant or agent, in violation of his instructions, makes a contract for freight.³⁶ A purchaser of machinery who contracts to remove it from the railroad to his building, where it is to be erected by the vendor, does not become a common carrier and liable for breakage of the machinery by mere accident, without his negligence.³⁷ A railroad acts as a private carrier, instead of as a common carrier, in carrying goods for an express company under a special agreement with such company.³⁸ And where a railroad company undertakes to haul along its line wagons belonging to private traders, it is a private carrier as to such wagons.³⁹ A common carrier may, by special contract, limit its common law liability, and thus become a private carrier or bailee for hire as to the particular goods carried under the contract, although it cannot by special contract create an exemption from liability for actual negligence of itself or its servants.⁴⁰ A common carrier may become a private carrier, when, as a matter of accommodation or special engagement, it undertakes to carry something which it is not its business to carry.^{40a}

33. *Beckman v. Shouse*, 5 Rawle. (Pa.) 179, 28 Am. Dec. 653.

33a. *McBurnie v. Stelsly*, 29 Ky. Law Rep. 1191, 97 S. W. 42.

34. *Pike v. Nash*, 1 Keyes (N. Y.), 335, 3 Abb. Dec. (N. Y.) 610.

35. *McClure v. Richardson*, Rice L. (S. C.) 215, 33 Am. Dec. 105.

36. *Steele v. McTyer*, 31 Ala. 667, 70 Am. Dec. 516; *Jenkins v. Pickett*, 9 Yerg. (Tenn.) 481; *Satterlee v. Groat*, 1 Wend. (N. Y.) 272.

37. *Allis v. Voight*, 90 Mich. 125, 51 N. W. 190.

38. *Louisville, etc., R. Co. v. Keefer*, 146 Ind. 21, 44 N. E. 796, 38 L. R. A. 93, 5 Am. & Eng. Cas. N. S. 26.

39. *Watson v. North British R. Co.*, 3 Sc. Sess. Cas. (4th sess.) 637, 3 Ry. & C. T. Cas. 17.

40. *New York Cent. R. Co. v. Lockwood*, 17 Wall. (U. S.) 357.

40a. *Santa Fe, P. & P. Ry. Co. v.*

§ 11. Liability of private carriers for hire.

The private or special carrier for hire is bound to exercise ordinary prudence, care, and skill in carrying goods and delivering them to the consignee, and is liable for ordinary negligence resulting in loss or injury of the goods. He is not an insurer of the safety of the goods intrusted to him for transportation.⁴¹ Ordinary care has been defined to be "such care and diligence as a reasonably prudent man would exercise in the conduct of his own business or in the preservation of his property."⁴² A carrier for hire, although not a common carrier, is bound to make good losses arising from the negligence of his own servants, although he would not be liable for losses by thieves, or by any taking by force, if not himself guilty of negligence, or if the owner accompanies the goods to take care of them and is himself guilty of negligence; for it is a rule of law that a party cannot recover if his own negligence was as much the cause of the loss as that of the defendant.⁴³ But, in all such cases, whether there has or has not been a due degree of care on the part of the carrier, whether or not in the exercise

Grant Bros. Const. Co., — Ariz. —, 108 Pac. 467; Cleveland, C. C. & St. L. Ry. Co. v. Henry, 170 Ind. 94, 83 N. E. 710.

41. Allen v. Sackrider, 37 N. Y. 341; Fish v. Clark, 49 N. Y. 122, 2 Lans. (N. Y.) 176; Pike v. Nash, 1 Keyes (N. Y.), 335, 3 Abb. Dec. (N. Y.) 610; Beck v. Evans, 16 East, 244; Whalley v. Wray, 3 Esp. 74; Bowman v. Teall, 23 Wend. (N. Y.) 306; Allis v. Voight, 90 Mich. 125, 51 N. W. 190; White v. Bascom, 28 Vt. 268; Nelson v. Mackintosh, 1 Stark. 237, 2 E. C. L. 96.

42. United States v. Power, 6 Mont. 271; Ames v. Belden, 17 Barb. (N. Y.) 515; Samms v. Stewart, 20 Ohio, 73, 55 Am. Dec. 445; Story Bailm. § 399. "It is obvious that a bailee, whatever the character of the bailment may be, when its purpose has been fully satisfied and performed, is bound, upon request, to

redeliver the thing bailed to its lawful owner. This is necessarily implied, in all cases, from the nature of the contract of bailment. The authorities are uniform to the effect that such redelivery may be excused in the case of a bailment, mutually beneficial to the parties, by proof that the deposit has been lost or destroyed without negligence, or want of such care on the part of a bailee as prudent men under similar circumstances, commonly take of their own goods. In the case of gratuitous bailments, however, the bailee is liable only when chargeable with gross neglect." Ouderkirk v. Central Nat. Bank, 119 N. Y. 263. See Nelson v. Mackintosh, 1 Stark. 237, 2 E. C. L. 96. Compare Pender v. Robins, 6 Jones L. (N. C.) 207.

43. Brind v. Dale, 8 C. & P. 207, 34 E. C. L. 355; Cailiff v. Danvers, 1 Peake N. P. 114.

of ordinary diligence the loss could have been avoided, must be decided from all the circumstances surrounding the case.⁴⁴ The carrier being liable only for losses resulting from his negligence, the burden of proof is on the owner or consignee of the goods lost to show that the loss resulted from the negligence of the carrier. The question is for the jury to determine where the evidence is conflicting.⁴⁵

§ 12. Special contracts increasing or diminishing liability.

The rule is now well recognized that there is no restriction upon the right of any carrier to limit, by special contract, his common law liability for loss, except such loss as is due to the negligence of himself or servants.⁴⁶ Private or special carriers for hire may contract for a larger or more restricted liability than the law would imply against them in the absence of a special contract. They may become insurers against all possible hazards and assume liabilities coextensive with those of common carriers, or they may contract to answer for nothing but a loss happening through their own fraud or want of good faith. The contracting parties stand on equal terms and can make just such a bargain as they think will answer their purposes.⁴⁷ They are carriers, common or private, exactly according to their contracts, and their liabilities will be measured by the contract; and in actions against them for loss or damage, they must be declared against on the contracts or for a breach of duty, and not as common or private carriers.⁴⁸ Such contracts are strictly construed and an undertaking to carry "safely and securely" will not be presumed to enlarge the common law liability to carry free from ordinary negligence and to make the carrier an insurer of the goods. To do this there must be an express agreement.⁴⁹

44. Story Bailm. § 39.

45. *Kirtland v. Montgomery*, 1 Swan (Tenn.), 453; see *Burden of Proof*; *Carriers of goods*. Chap. 14.

46. *New York Cent. R. Co. v. Lockwood*, 17 Wall. (U. S.) 357; and other cases cited under *Limitation of Liability, Carriers of Goods*, chap. 10.

47. *Wells v. Steam Nav. Co.*, 2 N. Y. 204; *Alexander v. Green*, 3 Hill (N. Y.) 9; *Fish v. Chapman*, 2 Ga.

349; *Hand v. Baynes*, 4 Whart. (Pa.) 214; *Robinson v. Dunmore*, 2 Bos. & P. 417; *Hadley v. Clark*, 8 T. R. 259; *Breakneck Canal Nav. Co. v. Pritchard*, 6 T. R. 750; *Paradine v. Jane*, Alleyn. 27.

48. *Kimball v. Rutland Railroad*, 26 Vt. 247; *Robinson v. Dunmore*, 2 Bos. & P. 416.

49. *Ames v. Belden*, 17 Barb. (N. Y.) 516; *Foster v. Essex Bank*, 17

§ 13. Lien of the private carrier.

The rule seems to be that the private carrier has no common law lien upon the goods carried by him for his charges for transportation, and has a lien only when he specially reserves it by agreement, or it has been conferred by statute.⁵⁰ Most textwriters, reasoning from analogy, find no satisfactory reason why the private carrier should not have the same lien as the warehouseman and wharfinger, who have rendered service in respect to the goods for the owner's benefit, or the tradesman or artisan, who, by his labor and skill and materials furnished, has added to the value of the goods in his charge.⁵¹ This view has been criticised as questionable on the grounds that the artisan is given such a lien on the theory that he has bettered the property; the innkeeper and common carrier are recognized as entitled to it because they are in a measure public servants, and bound to perform services and furnish entertainment for all who apply; the warehouseman deals largely with the public, serving all who apply, although not bound to do so, furnishing facilities at great expense to serve the public whose patronage he seeks; while none of these reasons apply in the case of the private carrier.⁵² It was said by Lord Kenyon, in speaking of the liens of warehousemen and wharfingers, that liens were either by common law, usage or agreement; that a lien from usage was a matter of evidence; that the usage in the case under discussion had been proved so often it should be considered a settled point; and that liens by common law arose where a party was obliged to receive the goods.⁵³ The general lien of the wharfinger upon the goods of his customer entrusted to him and in his possession, for his balance in respect of freight and wharfage, was admitted; but the court refused to

Mass. 501, 9 Am. Dec. 168; *Oakley v. Portsmouth, etc., Steam Packet Co.*, 11 Exch. 618; *Ross v. Hill*, 2 C. B. 877, 3 Dowl. & L. 788; *United States v. Power*, 6 Mont. 271; *Scaife v. Farrant*, L. R. 10 Exch. 358.

50. *Riddle, Dean & Co. v. New York, etc., R. Co.*, 1 Int. Com. R. 594, 604, the compensation of a common carrier is assured to him by a lien upon the goods—a right which

is not enjoyed by a private carrier; *Jones, Liens*, § 276; *Fuller v. Bradley*, 25 Pa. St. 120; *Picquet v. McKay*, 2 Blackf. (Ind.) 465.

51. *Angell, Carriers* (5th ed.), § 66; *Hutchinson, Carriers*, § 46; *Jones, Liens*, § 276.

52. *Van Zile, Bailments and Carriers*, § 404.

53. *Holderness v. Collinson*, 1 M. & R. 55, 7 B. & C. 712.

allow a lien claimed for laborage (comprising landing, weighing and delivering), and warehouse rent, because the custom proved was not sufficiently certain and uniform to lay a foundation, upon which an express or implied contract could be found, to act upon it.⁵⁴ A warehouseman has a specific lien, unless it is made general by an express or implied contract, upon goods entrusted to him within his line of business, for his reasonable charges. His lien arose out of the usage of business, repeatedly proved and recognized until it has become an established right.⁵⁵ An artisan or other bailee for hire of labor and services has an interest or special property in the chattels upon which his labor or services are performed, for which he has a specific lien until he is paid for his labor, or parts with the possession pursuant to the terms of his agreement.⁵⁶ The lien of the artisan, therefore, seems to be founded upon his special property in the chattel and his having added something to its value; the lien of the common carrier and innkeeper is based upon the fact that they are bound to receive the goods and perform the services required; the lien of the ware-

54. *Holderness v. Collinson, supra*; *Naylor v. Mangles*, 1 Esp. 109; *Spears v. Hartley*, 3 Esp. 81; *Rushford v. Hadfield*, 6 East, 519; *Dresser v. Bosanquet*, 4 B. & S. 460, 116 E. C. L. R.

55. *Holderness v. Collinson, supra*; *Naylor v. Mangles, supra*; *Spears v. Hartley, supra*. As against a consignee, knowing the regulation and usage of a railroad company to require certain kinds of goods to be unloaded within twenty-four hours after notice to him of their arrival, the company as warehousemen have a lien on the goods for storage after the twenty-four hours have elapsed. *Miller v. Mansfield*, 112 Mass. 260.

A warehouseman has a specific, not a general lien; but he may deliver a part, and retain the residue for the price chargeable on all the goods received by him under the same bailment, provided the ownership of

the whole is in the same person. *Steinman v. Wilkins*, 7 Watts & S. (Pa.) 466. Where a quantity of merchandise is stored in a warehouse, and portions of it are from time to time delivered out without receiving the storage thereon, the warehouseman has a lien upon the residue for the storage of the whole; it being one transaction, the lien covers the whole of the goods deposited, and may rest upon each part of the entire claim. *Morgan v. Congdon*, 4 N. Y. 552; *Schmidt v. Blood*, 9 Wend. (N. Y.) 268; *McFarland v. Wheeler*, 26 Wend. (N. Y.) 467; *Lowe v. Martin* 18 Ill. 286; *Sears v. Wills*, 4 Allen (Mass.), 212; *Blake v. Nicholson*, 3 M. & S. 168.

56. *Gregory v. Stryker*, 2 Denio (N. Y.), 628; *Moore v. Hitchcock*, 4 Wend. (N. Y.) 292; *Wheeler v. McFarland*, 10 Wend. (N. Y.) 318, 324.

houseman and wharfinger is founded upon long established and well recognized usage; none of which reasons for a lien exist in the case of the private carrier. But it has been held that a carrier, by boat, of freight to a specified place and back, taking in and putting out freight at different places, as the shipper might direct, for a stipulated sum per day, has a lien on the freight remaining on board on the return of the boat, for the whole unpaid freight.⁵⁷ And, in a recent case, that the owner of a steamboat engaged in the business of towing is not a common carrier, entitled as such to a specific lien upon the goods carried, for his charges in transporting them, especially where he tows only for a single party, but that he has a common law bailee's lien thereon.⁵⁸

57. *Fuller v. Bradley*, 25 Pa. St. 120.

58. *Knapp, etc., Co. v. McCaffrey*, 178 Ill. 107, 52 N. E. 898, affg. 74 Ill. App. 80.

CHAPTER II.

COMMON CARRIERS.

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§ 1. What constitutes a common carrier.

A common or public carrier is one who, by virtue of his business or calling, undertakes, for compensation, to transport personal property from one place to another, either by land or water, and deliver the same, for all such as may choose to employ him; and every one, who undertakes to carry and deliver, for compensation, the goods of all persons indifferently, is, as to liability, to be deemed a common carrier.¹ One holding out to the public as

1. Jackson Architectural Iron Works v. Hurlbut, 158 N. Y. 34, 38, 52 N. E. 665, 70 Am. St. Rep. 432; affg. 15 Misc. Rep. (N. Y.) 93, 71 St. Rep. (N. Y.) 830, 36 N. Y. Supp. 808; Lough v. Outerbridge, 143 N. Y. 271, 145 N. Y. 691, affg. 68 Hun (N. Y.), 486; Allen v. Sackrider, 37 N. Y. 341; Bank of Orange v. Brown, 3 Wend. (N. Y.) 158, 161, 9 Wend. (N. Y.) 85; Alexander v. Green, 7 Hill (N. Y.), 544; Blanchard v. Isaacs, 3 Barb. (N. Y.) 388; O'Rourke v. Bates, 73 Misc. Rep. 414, 133 N. Y. Supp. 392; Schouler Bailm. & Car. (2d ed.) 351; Story Bail. §§ 495, 496; 2 Kent's Com. (4th ed.) pp. 598, 599; 2 Pars. Cont. 165, 175; Angell Carr. 870; 1 Smith's Lead. Cas. (8th Am. ed.) 392; Smith's Mercantile Law (Pomeroy's ed.), § 356.

A common carrier was defined in *Gisburn v. Hurst*, 1 Salk. 249, to be "any man undertaking, for hire, to carry the goods of *all persons indifferently*," and in *Dwight v. Brewster*, 1 Pick. (Mass.) 50, 11 Am. Dec. 133, to be "one who undertakes, for hire, to transport the goods of *such as choose to employ him* from place to place." *Allen v. Sackrider*, 37 N. Y. 341.

The former definition has been approved in *Gordon v. Hutchinson*, 1 W. & S. (Pa.) 285, 37 Am. Dec. 464; *Mershon v. Hobensack*, 22 N. J. L. 377; *Verner v. Sweitzer*, 32 Pa. St. 208; *Bank of Orange v. Brown*, *supra*, wherein Chief Justice Savage said: "Every person who undertakes to carry for a compensation, *the goods of all persons indifferently*, is as to the liability imposed, to be con-

ready to undertake for hire the transportation of goods, and so inviting custom of the public, is a common carrier.^{1a} A common carrier is one who openly professes to carry for hire the goods of all who choose to employ him, and whose duty it is to carry for all who comply with the terms as to freight, etc.; while a private carrier is one who, without being engaged in the business generally, undertakes to carry goods for hire in a particular case.^{1b} The employment of a common carrier is a public one and he assumes a public duty, and is bound to receive and carry the goods

sidered a common carrier. The distinction between a common carrier and a private or special carrier is, that the former holds himself out *in common*, that is to all persons who employ him, as ready to carry for hire; while the latter agrees in some special case with some private individual to carry for hire." Story Cont. § 752a.

Common carriers undertake generally, and not as a casual occupation, and for all people indifferently, to convey goods and deliver them at a place appointed for hire as a business, and with or without a special agreement as to price. 2 Kent's Com. 598.

The definition given in the text is substantially that approved by the following additional cases: The Propeller Niagara v. Cordes, 21 How. (U. S.) 22; Central R., etc., Co. v. Lampley, 76 Ala. 357, 52 Am. Rep. 334, 23 Am. & Eng. R. Cas. 720; Babcock v. Herbert, 3 Ala. 392, 37 Am. Dec. 695; Schloss v. Wood, 11 Cole. 287; Bennett v. Filyaw, 1 Fla. 453; Robertson v. Kennedy, 2 Dana (Ky.), 430, 26 Am. Dec. 466; Elkins v. Boston, etc., R. Co., 23 N. H. 275; Sheldon v. Robinson, 7 N. H. 157, 163, 26 Am. Dec. 726; Fuller v. Bradley, 25 Pa. St. 120; Littlejohn v. Jones, 2 McMul. (S. C.) 365, 39 Am.

Dec. 132; Chevallier v. Straham, 2 Tex. 115, 118, 47 Am. Dec. 639; Doty v. Strong, 1 Pin. (Wis.) 324, Burn. (Wis.) 158, 40 Am. Dec. 773.

1a. Lloyd v. Haugh & Keenan Storage & Transfer Co., 223 Pa. 148, 72 Atl. 516.

A common carrier is one whose business it is to carry chattels for all persons who may choose to employ and remunerate him; and this applies to carriers by land and water, without regard to distance or motive power. Nicolette Lumber Co. v. People's Coal Co., 26 Pa. Super. Ct. 575 (1904), rev'd 213 Pa. 379, 62 Atl. 1060, 3 L. R. A. (N. S.) 327, 110 St. Rep. 550.

1b. The Cape Charles, 198 Fed. 346.

A common carrier is one who undertakes for compensation to transport property from one place to another. United States v. Ramsey, 197 Fed. 144.

A company engaged in the livery business does not hold itself out to serve any and all persons, but operates only under a special contract, and deals with such persons only as it chooses, and is in no sense a common carrier. Trout v. Watkins Livery & Undertaking Co., — Mo. App. —, 130 S. W. 136.

of any one who offers, provided the goods be of the kind he professes to carry, and the person so offering agrees to have them carried upon the lawful terms prescribed by the carrier.² To

2. *Allen v. Sackrider*, 37 N. Y. 341; *Sanford v. American Dist. Tel. Co.*, 13 Misc. Rep. (N. Y.) 88, 34 N. Y. Supp. 144; *Hutchinson Carr.* § 47; *Bishop Noncont. Law*, §§ 1057, 1151, 1185; *Garton v. Bristol, etc., R. Co.*, 1 B. & S. 112, 101 E. C. L. 112.

A common carrier is one who plys between certain termini and openly professes to carry for hire the goods of all such persons as may choose to employ him. He may profess to carry all descriptions of goods or particular descriptions only. *Redman's Law of Railway Carriers* (2d ed.), 1.

To bring a person within the description of a common carrier, he must exercise it as a public employment, he must undertake to carry goods for persons generally, and he must hold himself out as ready to engage in the transportation of goods for hire, as a business, not as a casual occupation *pro hac vice*. *Story Bail.* § 495.

The common carrier is one who, by the ancient law, held as it were a public office and was bound to the public, and who, to become liable as a common carrier, must exercise the business of carrying as a public employment, and must undertake to carry goods for all persons indiscriminately and hold himself out as ready to engage in the transportation of goods for hire as a business, and not as a casual occupation. *Chitty Carr.*

A common carrier has also been defined to be "one who offers to carry goods for any person between certain termini or on a certain route, and

who is bound to carry for all who tender him goods and the price of carriage." *The Neafie*, 1 Abb. (U. S.) 467. See also, *Parsons on Shipping*, Vol. 1, p. 245; *Nugent v. Smith*, 1 C. P. Div. 427.

A common carrier is one who undertakes and exercises as a public employment the transportation or carriage of goods, for persons generally, from place to place, whether by land or water, and to deliver them at the place appointed, for hire or reward and with or without a special agreement as to price. *McHenry v. Philadelphia, etc., R. Co.*, 4 Harr. (Del.) 448; *Carpenter v. Baltimore & O. R. Co.*, 6 Penn. (Del.) 15, 64 Atl. 252.

Statutory definitions.—Every railroad corporation doing business in this State shall be a common carrier. Any one or two or more corporations owning or operating connecting roads, within this State, or partly within and partly without the State, shall be liable as a common carrier, for the transportation of passengers or delivery of freight received by it to be transported by it to any place on the line of a connecting road; and if it shall become liable to pay any sum by reason of neglect or misconduct of any other corporation, it may collect the same of the corporation by reason of whose neglect or misconduct it became liable. *The Railroad Law of New York*, § 48.

Every one who offers to the public to carry persons, property, or messages, except only telegraph messages, is a common carrier of whatever he

constitute a common carrier, it is not essential that the person or corporation undertaking such service own the means of transportation, it being sufficient that a contract is made by which the carrier agrees to transport and deliver the goods.^{2a} According to all the authorities, the essential characteristics of the common carrier are that he holds himself out as such to the world; that he undertakes generally, and for all persons indifferently, to carry goods and deliver them, for hire; and that his public profession of his employment be such that, if he refuse, without some just ground, to carry goods for any one, in the course of his employment and for a reasonable and customary price, he will be liable to an action.³ The nature and extent of the employment and business in which he holds himself out to the public either expressly

thus offers to carry. Cal. Civ. Code, 1886, § 2168.

Any person undertaking to transport goods to another place for a compensation is a carrier. One who pursues the business constantly or continuously for any period of time, or any distance of transportation, is a common carrier. 2 Ga. Code, 1895, §§ 2263, 2264.

"Any other carrier engaged in the transportation of messages or transportation of passengers or freight for hire," as used in Nebraska Laws 1907, p. 320, c. 90, § 4, defining a common carrier to be a corporation, etc., owning, managing, or controlling a railroad, etc., or any express company, car company, sleeping car company, and freight line company, telegraph and telephone companies, and any other carrier engaged in the transmission of messages or transportation of passengers or freight for hire, means only such companies as by their public profession hold themselves out as engaged in transmitting messages or transporting passengers or freight for hire, and as willing to perform such services for

any person having occasion to employ them. *State v. Union Stockyards Co. of Omaha*, 115 N. W. 627 (Neb. 1908).

2a. *Blakiston v. Davies, Turner & Co.*, 42 Pa. Super. Ct. 390; *J. H. Cownie Glove Co. v. Merchants' Dispatch Transp. Co.*, 130 Iowa 327, 106 N. W. 749, 114 Am. St. Rep. 419, 4 L. R. A. (N. S.) 1960.

3. *Fish v. Clark*, 2 Lans. (N. Y.) 176, 178, *affd.* 49 N. Y. 122; *Allen v. Sackrider*, *supra*; *Santa Fe P. & P. Co. v. Grant Bros. Const. Co.*, 108 Pac. (Ariz.) 467; 3 Kent's Com. 597; *Story Bail.* § 495; 2 *Parsons Cont.* 166, note; *Angell Com. Carr.* § 46.

The liability to an action for a refusal to carry is perhaps the safest criterion of the character of the carrier. *Fish v. Chapman*, 2 Kelly (Ga.), 352; 46 Am. Dec. 393. Compare *Gordon v. Hutchinson*, 1 W. & S. (Pa.) 285, 37 Am. Dec. 464; *Steinman v. Wilkins*, 7 W. & S. (Pa.) 466, 24 Am. Dec. 254. See, also, *Piedmont Manufacturing Co. v. Columbia*, etc., R., 19 S. C. 352, 16 Am. & Eng. R. R. Cas. 194.

or impliedly, as engaged, furnish the true limits of the rights, obligations, duties and liabilities of the common carrier.⁴ The chief distinction between common carriers and all others lies in the fact that, in respect to the extent of their responsibility and the liability they assume in their undertaking, they effectually insure the safe transportation and delivery of the goods they carry, and are made liable, by reason of the public nature of their employment and the responsibility imposed upon them by the law, upon the grounds of public policy, for loss or injury from whatever cause arising, excepting only acts of God and the public enemy, and in the further fact that, as public or common carriers for hire, they are obliged by law to carry for all persons indifferently.⁵ A common carrier may be a carrier of either passengers

4. *Citizens' Bank v. The Nantucket Steamboat Co.*, 2 Story (U. S.), 16, 35.

Holding out to the world as a test. For authorities, where this test has been applied, see *Kansas Pac. R. Co. v. Nichols*, 9 Kan. 253, 12 Am. Rep. 494; *Kirby v. Adams Express Co.*, 2 Mo. App. 369; *United States Exp. Co. v. Bachman*, 28 Ohio St. 144, 14 Am. Ry. Rep. 82; *Missouri Pac. R. Co. v. Harris*, 1 Tex. Civ. App. Cas. § 1257; *McClures v. Hammond*, 1 Bay (S. C.), 99, 1 Am. Dec. 598; *Moss v. Bettis*, 4 Heisk. (Tenn.) 661, 13 Am. Rep. 1; *Citizens' Bank v. The Nantucket Steamboat Co.*, *supra*; *Fish v. Clark*, *supra*; *Ingate v. Christie*, 3 C. & K. 61; *Nugent v. Smith*, 1 C. P. Div. 27, wherein the court said: "The test is not whether he is carrying on a public employment, or whether he carries to a fixed place; but whether he holds out, either expressly or by a course of conduct, that he will carry for hire, so long as he has room, the goods of all persons indifferently who send him goods to be carried." *Schloss v. Wood*, 11 Colo. 291, wherein the court said: "A person can hold himself out as a com-

mon carrier by engaging in the business generally, or by announcing or proclaiming it by cards, advertisements, or by any other means that would let the public know that he intended to be a common or general carrier for the public." *Roussel v. Aumais*, Rap. Jud. Que. 18, C. S. 474.

5. *Price v. Hartshorn*, 44 N. Y. 94, affg. 44 Barb. (N. Y.) 455; *South & North Alabama R. v. Wood*, 66 Ala. 167, 9 Am. & Eng. R. R. Cas. 419; *Varble v. Bigley*, 77 Ky. (14 Bush.) 698, 29 Am. Rep. 435, the two distinguishing characteristics of a common carrier are in respect to his duty, he being obliged to transport goods offered, and in respect to his risk, he being liable as an insurer; *Gales v. Hailman*, 11 Pa. St. 515; *Hart v. Chicago, etc., R. Co.*, 27 Am. & Eng. R. R. Cas. 59; *Texas Exp. Co. v. Scott*, 16 Am. & Eng. R. R. Cas. 111; *Houston, etc., R. Co. v. Burke*, 55 Texas, 323, 9 Am. & Eng. R. R. Cas. 59; *Davis v. Wabash, etc., R. Co.*, 26 Am. & Eng. R. R. Cas. 315; *Hall v. Railroad Co.*, 13 Wall. (U. S.) 367; *Hart v. Western, etc., R. Co.*, 13 Mete. (Mass.) 99; *Van Santvoored v. St. John*, 6 Hill (N. Y.),

or freight, or both; but the nature of the responsibility incurred is very different in the two cases; in one, his responsibility being that of a carrier of passengers, and negligence being the essential element of the case, as will be hereafter shown, and in the other, that of a common carrier of goods.⁶ Any person or corporation offering its services to all persons similarly situated and performing as its public vocation the services of transporting passengers, freight, or intelligence is a common carrier in the particular spheres of such employment.^{6a} To constitute one a common carrier it is not necessary that his exclusive business shall be carrying.⁷ It has been held that in order to constitute one a common carrier the business of carrying must be habitual and not casual;⁸ and, to the contrary, that one who carries goods for hire contracts the responsibility of a common carrier, whether transportation be his principal and direct business, or an occasional and incidental

157; *Lane v. Cotton*, 1 Salk. 143; *Nugent v. Smith*, L. R. 1 C. P. Div. 19, 423.

6. *Thompson Houston Electric Co. v. Simon*, 20 Or. 60, 25 Pac. 147, 10 L. R. A. 251, 43 Alb. L. J. 48; *Boyce v. Anderson*, 2 Peters (U. S.), 150; *Stokes v. Saltonstall*, 13 Peters (U. S.), 181; *Hollister v. Nowlen*, 19 Wend. (N. Y.) 234; *Camden, etc., R. Co. v. Burke*, 13 Wend. (N. Y.) 611; *Aston v. Heaven*, 2 Esp. 533; *Crofts v. Waterhouse*, 3 Bing. 319, 11 Moore, 133; *Readhead v. Ry. Co.*, L. R. 2 Q. B. 412, L. R. 4 Q. B. 379; *Pittsburgh, etc., R. Co. v. Hinds*, 53 Pa. St. 512; *Cleveland, C. C. & St. L. Ry. Co. v. Henry*, 170 Ind. 94, 83 N. E. 710, revg. — Ind. —, 80 N. E. 636. See also, *Carriers of Passengers*.

Common carriers of passengers are such as undertake to carry all persons who may apply for passage, so long as there is room and there is no legal excuse for refusing. *Gillingham v. Ohio River R. Co.*, 35 W. Va. 588, 29 Am. St. Rep. 827; *Bouv. Law*

Dict. tit. "Common Carriers of Passengers." The only distinction between a common or public carrier of passengers and a private or special carrier of passengers is that it is the duty of the former to receive all persons who apply. *Angell Carr. § 524*.

6a. *State v. Union Stockyards Co. of Omaha*, 81 Neb. 67, 115 N. W. 627.

A corporation is none the less a general carrier, as defined by *Minnesota Gen. St. 1894, § 379*, because its articles do not in terms prescribe that one of its powers is to carry freight. *In re Minneapolis & St. P. Suburban Ry. Co.*, 101 Minn. 132, 112 N. W. 13 (1907).

7. *Jackson A. Iron Works v. Hurlbut*, 158 N. Y. 34, 52 N. E. 665; *The Propeller Niagara v. Cordes*, 21 How. (U. S.) 7; *Dwight v. Brewster*, 1 Pick. (Mass.) 50.

8. *Fish v. Chapman*, 2 Ga. 349, 46 Am. Dec. 393; *Samms v. Stewart*, 20 Ohio, 69, 55 Am. Dec. 445; *Nugent v. Smith*, 1 C. P. Div. 27; *Story Bail. § 495*; 2 *Kent's Com.* 597.

employment.⁹ The rule has been laid down that one who undertakes, for a reward, to carry produce or goods of any sort from one place to another becomes thereby a common carrier;¹⁰ and that the distinctive characteristic of a common carrier is that he transports goods for hire for the public generally, and it is immaterial whether this is his usual or occasional occupation, his principal or subordinate pursuit.¹¹

It has been said that the true test of the character of a party is his legal duty and obligation with reference to transportation. If it is his legal duty to carry for all alike who comply with his terms as to freight, etc., then he is a common carrier, and is subject to all those stringent rules which for wise ends have long since been adopted and uniformly enforced, both in England and in all the States, upon common carriers. If, on the contrary, he may carry or not, as he deems best, he is but a private individual, and is invested, like all other private persons, with the right to make his own contracts, and when made to stand upon them, and he is not bound by the stringent rules applicable to common carriers.¹² On the other hand, it has been maintained that the duty to carry is one of the results of the relation of common carrier and in no way one of its causes or distinguishing features. If a carrier is sued for a refusal to carry, the first question presented, and the one upon which the case must depend, is whether or not it is a common carrier. The status of the defendant as a common carrier must be first established before the duty to carry can be known to exist.¹³ In the absence of charter or statutory provisions affecting its right, it is competent for a railroad company to determine for itself within what limits it will act as a common carrier, what business it will engage in, what means and methods of transportation it will employ, what goods it will carry, and between what points

9. *Gordon v. Hutchinson*, 1 W. & S. (Pa.) 285, 37 Am. Dec. 464; *Hahl v. Laux*, 42 Tex. Civ. App. 182, 93 S. W. 1080.

10. *Craig v. Childress*, Peck (Tenn.), 270, 14 Am. Dec. 751; *Turney v. Wilson*, 7 Yerg. (Tenn.) 340, 27 Am. Dec. 515; *Moses v. Norris*, 4 N. H. 306.

11. *Chevallier v. Straham*, 2 Tex. 119, 47 Am. Dec. 639; *Haynie v. Baylor*, 18 Tex. 498.

12. *Piedmont Mfg. Co. v. Columbia, etc., R. Co.*, 19 S. C. 353, 16 Am. & Eng. R. Cas. 194.

13. *Steinman v. Wilkins*, 7 W. & S. (Pa.) 466, 42 Am. Dec. 254.

and under what circumstances and conditions it will receive the same, subject always to the limitation that it must act in good faith, reasonably, and not arbitrarily or capriciously, and without discrimination; doing for all under like circumstances what it does for any.¹⁴

§ 2. The liability of the common carrier.

The common law liability of the common carrier of goods, in the absence of special contract or proven custom limiting such liability, is that of an insurer against loss or injury of the property, while in its custody or under its control as a common carrier, or until delivery or what is deemed tantamount to delivery to the consignee or owner, excepting only those losses or injuries caused by the act of God or the public enemy.¹⁵ But the strict rule of

14. *Harp v. Choctaw, etc., Ry. Co.* (U. S. C. C. Ark.), 118 Fed. 169.

15. Common law liability that of an insurer. *U. S.*—*Holladay v. Kennard*, 12 Wall. (U. S.) 254; *Pearson v. Duane*, 71 U. S. (4 Wall.) 605, 18 L. Ed. 447; *Dusar v. Murgatroyd*, 1 Wash. (U. S.) 17; *Pendall v. Rench*, 4 McLean (U. S.), 259; *Burritt v. Rench*, 4 McLean (U. S.), 325.

Ala.—*Louisville, etc., R. Co. v. McGuire*, 79 Ala. 395; *Jones v. Pitcher*, 3 Stew. & P. (Ala.) 135, 24 Am. Dec. 716.

Ark.—*Packard v. Taylor*, 35 Ark. 402, 37 Am. Rep. 37.

Cal.—*Bohannon v. Hammond*, 42 Cal. 227; *Hooper v. Wells*, 27 Cal. 161, 85 Am. Dec. 211.

Conn.—*Williams v. Grant*, 1 Conn. 487, 7 Am. Dec. 235.

Del.—*Culbreth v. Philadelphia, etc., R. Co.*, 3 Houst. (Del.) 392.

Fla.—*Clyde Steamer Co. v. Burrows*, 36 Fla. 121.

Ga.—*Cooper v. Berry*, 21 Ga. 526, 68 Am. Dec. 468; *Fish v. Chapman*, 2 Ga. 349, 46 Am. Dec. 393.

Ill.—*Chicago, etc., R. Co. v. Sawyer*, 69 Ill. 285, 18 Am. Rep. 613; *Chicago, etc., R. Co. v. Shea*, 66 Ill. 471; *Illinois Cent. R. Co. v. McClellan*, 54 Ill. 58, 5 Am. Rep. 83; *Western Transp. Co. v. Newhall*, 24 Ill. 466, 76 Am. Dec. 760.

Ind.—*Louisville, etc., R. Co. v. Nicholai*, 4 Ind. App. 119, 30 N. E. 424, 45 Alb. L. J. 412; *Adams Express Co. v. Darnell*, 31 Ind. 20, 99 Am. Dec. 582; *Bansemmer v. Toledo, etc., R. Co.*, 25 Ind. 434, 87 Am. Dec. 367.

Ky.—*Bland v. Adams Express Co.*, 1 Duv. (Ky.) 232, 85 Am. Dec. 623; *Robertson v. Kennedy*, 2 Dana (Ky.), 431, 26 Am. Dec. 466; *Hall v. Renfro*, 3 Mete. (Ky.) 51.

La.—*Berje v. Texas, etc., R. Co.*, 37 La. Ann. 468; *Cranwell v. Ship Fanny Fosdick*, 15 La. Ann. 436, 77 Am. Dec. 190; *Van Hern v. Taylor*, 7 Rob. (La.) 291, 41 Am. Dec. 279.

Me.—*Fillebrown v. Grand Trunk R. Co.*, 55 Me. 462, 92 Am. Dec. 606; *Parker v. Flagg*, 26 Me. 181, 45 Am. Dec. 101.

the common law is not now held to apply to carriers of live

Md.—Ferguson v. Brent, 12 Md. 9, 71 Am. Dec. 582.

Mass.—Claffin v. Boston, etc., R. Co., 7 Allen (Mass.), 341.

Miss.—Mobile, etc., R. Co. v. Weiner, 49 Miss. 725; Southern Express Co. v. Moon, 39 Miss. 822; Bennett v. Byram, 38 Miss. 17, 75 Am. Dec. 90; Powell v. Mills, 30 Miss. 231, 64 Am. Dec. 158; Whitesides v. Thurlkill, 12 Smed. & M. (Miss.) 599, 51 Am. Dec. 128; Gilmore v. Carman, 1 Smed. & M. (Miss.) 279, 40 Am. Dec. 96; Neal v. Saunderson, 2 Smed. & M. (Miss.) 572, 41 Am. Dec. 609.

Mo.—Davis v. Wabash, etc., R. Co., 89 Mo. 340, 26 Am. & Eng. R. Cas. 315, revg. 13 Mo. App. 449; Daggett v. Shaw, 3 Mo. 264, 25 Am. Dec. 439.

N. H.—Moses v. Boston, etc., R. Co., 24 N. H. 71, 55 Am. Dec. 222.

N. J.—New Brunswick Steamboat, etc., Transp. Co. v. Tiers, 24 N. J. L. 697, 64 Am. Dec. 394.

N. Y.—McKinney v. Jewett, 90 N. Y. 267, 9 Am. & Eng. R. Cas. 209, affg. 24 Hun (N. Y.), 19; Read v. Spaulding, 39 N. Y. 630, 86 Am. Dec. 426; Michaels v. New York Cent. R. Co., 30 N. Y. 564, 86 Am. Dec. 415; Merritt v. Earle, 29 N. Y. 115, 86 Am. Dec. 292; Howe v. Oswego, etc., R. Co., 56 Barb. (N. Y.) 121; Heine-man v. Grand Trunk R. Co., 31 How. Pr. (N. Y.) 430; Parsons v. Hardy, 14 Wend. (N. Y.) 215, 28 Am. Dec. 521; De Mott v. Laraway, 14 Wend. (N. Y.) 225, 28 Am. Dec. 523; Colt v. McMechen, 6 Johns. (N. Y.) 160, 5 Am. Dec. 200.

N. C.—Boner v. Merchants' Steamboat Co., 1 Jones L. (N. C.) 211; Harrell v. Owens, 1 Dev. & B. L. (N. C.) 273.

Ohio.—Welsh v. Pittsburg, etc., R. Co., 10 Ohio St. 65, 75 Am. Dec. 490.

Pa.—Willock v. Pennsylvania R. Co., 166 Pa. St. 184, 45 Am. St. Rep. 674, 61 Am. & Eng. R. Cas. 278; Leonard v. Hendrickson, 18 Pa. St. 40, 55 Am. Dec. 587; Simpson v. Hand, 6 Whart. (Pa.) 311, 36 Am. Dec. 231.

S. C.—Porcher v. Northeastern R. Co., 14 Rich. L. (S. C.) 181; Ewart v. Street, 2 Bailey L. (S. C.) 157, 23 Am. Dec. 131; Smyrl v. Niolon, 2 Bailey L. (S. C.) 421, 23 Am. Dec. 146.

Tenn.—Watson v. Memphis, etc., R. Co., 9 Heisk. (Tenn.) 255; Nashville, etc., R. Co. v. David, 6 Heisk. (Tenn.) 261, 19 Am. Rep. 594; Turney v. Wilson, 7 Yerg. (Tenn.) 340, 27 Am. Dec. 515; Craig v. Childress, Peck (Tenn.), 270, 14 Am. Dec. 751; Lewis v. Ludwick, 6 Coldw. (Tenn.) 368, 98 Am. Dec. 454.

Tex.—Philleo v. Sanford, 17 Tex. 231, 67 Am. Dec. 654; Texas, etc., R. Co. v. Morse, 1 Tex. Civ. App. Cas. § 411; Texas Express Co. v. Scott, 16 Am. & Eng. R. Cas. 111; Chevalier v. Straham, 2 Tex. 115, 47 Am. Dec. 639.

Vt.—Blumenthal v. Brainerd, 38 Vt. 402, 91 Am. Dec. 349; Day v. Ridley, 16 Vt. 48, 42 Am. Dec. 489.

Va.—Farish v. Reigle, 11 Gratt. (Va.) 697, 62 Am. Dec. 666; Friend v. Woods, 6 Gratt. (Va.) 189, 52 Am. Dec. 119; Murphy v. Staton, 3 Munf. (Va.) 239.

Wis.—Strohm v. Detroit, etc., R. Co., 23 Wis. 126, 99 Am. Dec. 114; Wood v. Crocker, 18 Wis. 345, 86 Am. Dec. 773.

Eng.—Coggs v. Bernard, 2 Ld. Raym. 909, 1 Smith's L. Cas. 199;

stock; ¹⁶ nor where the loss or injury resulted from the inherent nature of the goods; ¹⁷ nor where the loss or injury was due to the negligence of the shipper; ¹⁸ nor where the loss or injury resulted from delay in the transmission of the goods; ¹⁹ nor where the loss or injury was caused by the exercise of public authority.²⁰ The rule imposing the severe responsibility of an insurer upon him who undertook the task of carrying goods for the public which prevailed under the common law of England and the civil law of Rome originated in times when transportation, both by land and water, was insecure, and when the risk of collusion between the carrier and pirates or thieves was great. It was thought that in no other way could fidelity be insured. The liability imposed was thus based largely upon reasons of public policy, and did not rest wholly on contract, express or implied, between the carrier and the shipper.²¹ It is upon this obligation to carry and deliver safely

Riley v. Horne, 5 Bing. 217, 15 E. C. L. 422; Nugent v. Smith, 1 C. P. Div. 19, 423; Forward v. Pittard, 1 T. R. 27, 1 Rev. Rep. 146.

16. See § 3.

17. See § 4, *post*.

18. See § 5, *post*.

19. See § 6, *post*.

20. See § 7, *post*.

21. Reasons for severe responsibility.—In the case of Nugent v. Smith, L. R. 1 C. P. 19, 423, Brett, J., after stating that the real test whether a man is a common carrier is whether he holds out, either expressly or by a course of conduct, that he will carry for hire, so long as he has room, the goods of all persons indifferently who send him goods to be carried, says: "If he does this, his first responsibility naturally is that he is bound by a promise, implied by law, to receive and carry for a reasonable price the goods sent to him upon such an invitation. This responsibility is not one adopted from the Roman law on grounds of

policy; it arises according to the general principles which govern all implied promises. And his second responsibility, which arises upon reasons of policy, is that he carries the goods upon a contract of insurance. This policy has fixed the latter liability upon common carriers by land and water, not because they hold themselves out to carry for all persons indifferently; if that were all, there would be no ground for the policy; it would be without reason. Many other persons hold themselves out to act in their trade or business for all persons indifferently who will employ them, and the policy in question is not applied to such trades; the policy is applied to the trade of common carriers, because when the common law adopted that policy the business of common carriers in England was exercised in a particular manner and subject to particular conditions, which called for the adoption of that policy."

In Coggs v. Bernard, 2 Ld. Raym.

imposed by law, and existing independently of any special contract, founded upon grounds of public policy to give due security to property, that the liability of the common carrier for the loss of property intrusted to it for transportation rests.²² The rule of

909, 1 Smith's L. Cas. 199, Lord Holt said: "The law charges this person, thus intrusted to carry goods, against all events but acts of God and of the enemies of the King. For, though the force be never so great, as if an irresistible multitude of people should rob him, nevertheless he is chargeable. And this is a politic establishment, contrived by the policy of the law for the safety of all persons, the necessity of whose affairs obliges them to trust these sorts of persons, that they may be safe in their ways of dealing; for else these carriers might have an opportunity of undoing all persons that had any dealings with them, by combining with thieves, etc.; and yet doing it in such a clandestine manner as would be impossible to be discovered. And this is the reason the law is founded upon in that point."

In *Riley v. Horne*, 5 Bing. 217, 15 E. C. L. 422, Best, C. J., said: "When goods are delivered to a carrier, they are usually no longer under the eye of the owner; he seldom follows or sends any servants with them to the place of their destination. If they should be lost or injured by the grossest negligence of the carrier or his servants, or stolen by them, or by thieves in collusion with them, the owner would be unable to prove either of these causes of loss. His witnesses must be the carrier's servants; and they, knowing that they could not be contradicted, would excuse their masters and themselves.

To give due security to property, the law has added to that responsibility of a carrier, which immediately arises out of his contract to carry for a reward, namely, that of taking all reasonable care of it, the responsibility of an insurer. From his liability as an insurer, the carrier is only to be relieved by two things, both so well known to all the country when they happen, that no person would be so rash as to attempt to prove that they had happened when they had not, namely, the act of God and the king's enemies."

22. *Coggs v. Bernard*, *supra*; *Riley v. Horne*, *supra*. *The liability exists independent of contract* when the defendant, being a common carrier, has in his custody for transportation the plaintiff's property, and by his negligence or in violation of duty, it is lost. *Merritt v. Earle*, 29 N. Y. 115, 86 Am. Dec. 292; *Allen v. Sewall*, 2 Wend. (N. Y.) 338; *Thurman v. Wells*, 18 Barb. (N. Y.) 500; *Johnson v. East Tennessee, etc., R. Co.*, 90 Ga. 810; *Delaware, etc., R. Co. v. Trautwein*, 52 N. J. L. 169, 19 Am. St. Rep. 442, 41 Am. & Eng. R. Cas. 187; *Arnold v. Jones*, 26 Tex. 335, 82 Am. Dec. 617; *Wood v. Crocker*, 18 Wis. 345, 86 Am. Dec. 773.

The liability of a common carrier does not rest in his contract, but is a liability imposed by law. It exists independently of the contract, having its foundation in the policy of the law, and it is upon this legal ob-

liability thus established by the common law, except as modified by statute and modern adjudications, in the respects already noted and hereinafter referred to, to suit our character and circumstances applies to common carriers of all kinds, whether by land or water.²³ The common law liability of a carrier, or the common law liability as modified by statute, is always presumed to be the measure of his liability, in the absence of evidence to the contrary, and the burden of proving the actual contract rests upon the party who claims exemption by reason thereof from the ordinary liability of common carriers in a particular case.²⁴

ligation that he is charged as carrier for the loss of property intrusted to him. *Hollister v. Nowlen*, 19 Wend. (N. Y.) 239, 32 Am. Dec. 455; *Ansell v. Waterhouse*, 1 Chit. 1; *Edwards Bailm.* 466.

23. *Houston, etc., Nav. Co., v. Dwyer*, 29 Tex. 376. See Owners and masters of ships and steamboats or vessels, § 29, *post*. *Angell Carr.* §§ 166, 223; 2 *Kent's Com.* 216; 9 *U. S. Stat. at Large*, 635.

24. *Jennings v. Grand Trunk R. Co.*, 127 N. Y. 438, 447; *Park v. Preston*, 108 N. Y. 434; *Dorr v. New Jersey Steam Nav. Co.*, 11 N. Y. 485, 62 Am. Dec. 125; *Blossom v. Dodd*, 43 N. Y. 264, 3 Am. Rep. 701; *Madan v. Sherrard*, 73 N. Y. 330, 29 Am. Rep. 153; *New Jersey R. Co. v. Pennsylvania R. Co.*, 27 N. J. L. 100; *Pittsburgh, etc., R. Co. v. Barrett*, 36 Ohio St. 448, 3 Am. & Eng. R. Cas. 257; *Graham v. Davis*, 4 Ohio St. 376, 62 Am. Dec. 285; *Peoria, etc., R. Co. v. United States Rolling Stock Co.*, 136 Ill. 643, 29 Am. St. Rep. 348, 49 Am. & Eng. R. Cas. 81; *New Jersey Steam Nav. Co. v. Merchants' Bank*, 6 How. (U. S.) 344.

The defendants, safe movers, are not relieved from liability as com-

mon carriers for the breaking of machinery being moved by them, because plaintiff insisted on having the machine placed after dark, they having a right to refuse if they chose, and to stipulate from immunity from damages if it increased their risk as insurers. *Jackson Architectural Iron Works v. Hurlburt*, 15 Misc. Rep. (N. Y.) 93, 36 N. Y. Supp. 808. Upon the appeal in the case last cited, the court said: "This interference on the part of the plaintiff's agents is said to constitute contributory negligence. It is quite sufficient to say, with respect to that branch of the defense, that the evidence was of such a character that required the court to submit it to the jury, and it was submitted with instructions that, if it was shown that the negligence of the plaintiff or its agents contributed in any way to the injury, there could be no recovery. So the questions of negligence and contributory negligence have been removed by the verdict of the jury from the domain of controversy in this court. *Id.*, 158 N. Y. 34, 39.

Where a common carrier undertakes, by the contract expressed in the bill of lading, to deliver the

§ 3. Liability in the carrying of live stock.

The common law liability of a carrier may be limited by the intrinsic character of, or defects in, the subject matter of the contract. This limitation was applied to contracts for the carriage of slaves, when slavery existed in the United States, the carrier, in such cases, being held not to be an insurer but a carrier of passengers, and liable only for want of care and skill.²⁵ This rule has found its most frequent illustration in the case of contracts for the transportation of live stock. The carrier who undertakes the carriage of living animals is not answerable for damage caused by the conduct or propensities of the animals themselves. In other respects the common law responsibilities of the carrier will attach.²⁶

goods at their destination, without stipulating that he shall not be liable for losses resulting from any cause, his undertaking will not amount to an absolute undertaking, and he will not be liable for losses resulting from an act of God or a public enemy. *Neal v. Saunderson*, 2 Smed. & M. (Miss.) 572, 41 Am. Dec. 609.

No presumption as to special contract.—The fact that defendant was accustomed to give shippers receipts containing a provision that it would not be liable for loss by fire will not support a presumption that there was a special contract between plaintiff's assignors and defendant, whereby its liability as a common carrier did not include loss by fire, in the absence of any showing that such a receipt was ever given to plaintiff's assignors, or came to their knowledge. *London, etc., Fire Ins. Co. v. Rome, etc., R. Co.*, 68 Hun (N. Y.), 598, 23 N. Y. Supp. 231.

25. *Williams v. Taylor*, 4 Porter (Ala.) 234; *Boyce v. Anderson*, 2 Peters (U. S.) 150; *Clark v. McDonald*, 4 McCord (S. C.) 223.

26. "In the transportation of such stock, in the absence of negligence, the carrier is relieved from responsibility for such injuries as occur in consequences of the vitality of the freight. He does not absolutely warrant live freight against the consequences of its own vitality. Animals may injure or destroy themselves or each other; they may die from fright or from starvation because they refuse to eat, or they may die from heat or cold. In all such cases the carrier is relieved from responsibility if he can show that he has provided all suitable means of transportation and exercised that degree of care which the nature of the property requires." *Cragin v. New York Cent. R. Co.*, 51 N. Y. 61; *Clarke v. Rochester, etc., R. Co.*, 14 N. Y. 570; *Bissell v. New York Cent. R. Co.*, 25 N. Y. 442; *Smith v. New Haven, etc., R. Co.*, 94 Mass. 531.

"According to the established rule as to the liability of a common carrier, he is understood to guarantee that (with the well known exception of the act of God and of public ene-

§ 4. Liability where loss or injury results from the inherent nature of the goods.

The same principles which relieve the carrier from its strict liability in carrying live stock apply with equal force to contracts

mies) the goods intrusted to him shall seasonably reach their destination, and that they shall receive no injury from the manner in which their transportation is accomplished. But he is not, necessarily and under all circumstances, responsible for the condition in which they may be found upon their arrival. The ordinary and natural decay of fruit, vegetables and other perishable articles, the fermentation, evaporation or unavoidable leakage of liquids, the spontaneous combustion of some kinds of goods, are matters to which the implied obligation of the carrier, as an insurer, does not extend. He is liable for all accidents and mismanagement incident to the transportation and to the means and appliances by which it is effected; but not for injuries produced by, or resulting from, the inherent defects or essential qualities of the articles which he undertakes to transport. The extent of his duty in this respect is to take all reasonable care and use all proper precautions to prevent such injuries, or to diminish their effect as far as he can; but his liability, in such cases, is by no means that of an insurer. . . . They would be unconditionally liable for all injuries occasioned by the improper construction or unsafe condition of the carriage in which the horses were conveyed, or by its improper position in the train, or by the want of reasonable equipment, or by any mismanagement, or want of due care, or by any other accident (not within the well known exception) affecting

either the train generally or that particular carriage. But the transportation of horses or other domestic animals is not subject to precisely the same rules as that of packages and inanimate chattels. Living animals have excitabilities and volitions of their own which greatly increase the risks and difficulties of management. They are carried in a mode entirely opposed to their instincts and habits; they may be made uncontrollable by fright, or, notwithstanding every precaution, may destroy themselves in attempting to break loose, or may kill each other." *Evans v. Fitchburg R. Co.*, 111 Mass. 142; *Story Bailm.*, § 576.

"The carrier would not be held responsible," it has been held, "where horses or other animals were being transported by water, and in consequence of a storm broke down the partitions between them, and by kicking each other some of them were killed." *Lawrence v. Aberdeen*, 5 B. & Ald. 107; *Angell Carr.*, § 214a.

In *Myrick v. Michigan Cent. R. Co.*, 107 U. S. 102, 107, the court said: "Although a railroad company is not a common carrier of live animals in the same sense that it is a carrier of goods, its responsibilities being in many respects different, yet, when it undertakes generally to carry such freight, it assumes under similar conditions the same obligations so far as the route is concerned over which the freight is to be carried."

In some states, however, the rule appears to be different. It is there held that railroads are not bound to

for the carriage of perishable property. The carrier is not liable for injuries caused by its intrinsic defects, and not from any want of care on the part of the carrier.²⁷ But he is bound to take reasonable means to guard against such injuries,²⁸ to use special dili-

receive live stock as common carriers, and if they carry them at all, they may do so under a different liability from that of other freight. See Carriers of Live Stock.

See also in support of the rule stated in the text: *South & North Alabama R. Co. v. Henlien*, 52 Ala. 606; *Agnew v. Steamer Contra Costa*, 27 Cal. 425; *Indianapolis, etc., R. Co. v. Jurey*, 8 Bradw. (Ill. App.) 160; *Chicago, etc., R. Co. v. Harmon*, 12 Bradw. (Ill. App.) 54; *McCoy v. The K. & D. M. R. Co.*, 44 Iowa, 424; *Chicago, etc., R. Co. v. Abels*, 60 Miss. 1017; *Mynard v. Syracuse, etc., R. Co.*, 71 N. Y. 180; *Bamberg v. South Carolina R. Co.*, 9 S. C. 61; *Palmer v. Grand Junction R. Co.*, 4 M. & W. 749; *Kimball v. Rutland, etc., R. Co.*, 26 Vt. 247. Compare *Missouri Pac. R. Co. v. Harris*, 67 Tex. 166; *Missouri Pac. R. Co. v. Fagan* (Tex.), 9 S. W. 749; *Rixford v. Smith*, 52 N. H. 355; *Maslin v. Baltimore, etc., R. Co.*, 14 W. Va. 180. See Carriers of Live Stock.

Carriers of animals are common carriers subject to the same responsibilities imposed by law on carriers of other property, except as this is modified by the inherent character of such property. *Missouri Pac. R. Co. v. Cornwall*, 70 Tex. 611, 8 S. W. 312; *Gulf, etc., R. Co. v. Ellison*, 70 Tex. 491, 7 S. W. 785.

27. *Evans v. Fitchburg R. Co.*, 111 Mass. 142 (opinion quoted from in note 26 to § 3, *ante*); *Illinois Cent.*

R. Co. v. McClellan, 54 Ill. 58, 5 Am. Rep. 83; *Vail v. Pacific R. Co.*, 63 Mo. 230; *McGraw v. Baltimore, etc., R. Co.*, 18 W. Va. 361, 41 Am. Rep. 696, 9 Am. & Eng. R. Cas. 188. See also, *Nugent v. Smith*, 1 C. P. Div. 423, 45 L. J. C. P. Div. 697; *Kendall v. London, etc., R. Co.*, L. R. 7 Exch. 373, 41 L. J. Exch. 184; *Alston v. Herning*, 11 Exch. 822; *Brass v. Maitland*, 6 El. & Bl. 471, 88 E. C. L. 471; *Rohl v. Parr*, 1 Esp. N. P. 445; *Boyd v. Dubois*, 3 Campb. 133; *Hunter v. Potts*, 4 Campb. 203.

The common law rule making carriers liable for loss or damage to goods, except such as result from the act of God or the public enemy, does not apply to a loss which results from deterioration in quantity or quality, or from any inherent natural infirmity, or tendency to damage, or decay of perishable articles, or ordinary wear or tear, or rubbing, in course of transportation, where these things occur without negligence on the part of the carriers; nor are they liable for injuries that arise from bad packing by the shippers. *Truax v. Philadelphia, etc., R. Co.*, 3 Houst. (Del.) 233.

28. *Davidson v. Gwynne*, 12 East, 381; *Notara v. Henderson*, L. R. 5 Q. B. 225, where the carrier failed to spread out and dry beans which had become wet by an accident to the vessel; *Bird v. Cromwell*, 1 Mo. 81, 13 Am. Dec. 470; *Chouteaux v. Leech*, 18 Pa. St. 224, 57 Am. Dec.

gence to avoid delay in transportation,²⁹ and give it a preference in transportation over nonperishable goods, if he is not able to

602, where, in the course of transportation, certain furs were wet, through an accident to the boat, it was held that it was the carrier's duty to unpack them and allow them to dry immediately, and for a failure to do so the carrier was liable for the damage which such attention would have averted.

So, where dressed meat was being carried, and, owing to a delay of the vessel, the ice in which it was packed melted away, it was held that the carrier was liable for the damage resulting from its failure to supply ice, it appearing that it was practicable to have done so. *Sherman v. Inman Steamship Co.*, 26 Hun (N. Y.), 107; *Peck v. Weeks*, 34 Conn. 145.

Failure to prevent leakage. A carrier was held liable for failure to wet casks containing oil in order to prevent their leakage; and the fact that loss from leakage was one of the special exceptions in the bill of lading releasing the carrier from liability was held not to affect the case, where the carrier had agreed to keep the casks wet. *Hennewell v. Taber*, 2 Sprague (U. S.) 1. A carrier was also liable where, after becoming aware that a cask of brandy which was being carried was leaking, he failed to take any steps to prevent further leakage. *Beck v. Evans*, 16 East, 244; *Cox v. London, etc.*, R. Co., 3 F. & F. 77. See also, *The Brig Collenberg*, 1 Black (U. S.) 170; *Warden v. Greer*, 6 Watts (Pa.) 424; *Leech v. Baldwin*, 5 Watts (Pa.)

446; *Gowdy v. Lyon*, 9 B. Mon. (Ky.) 112.

29. *Kinnick v. Chicago, etc.*, R. Co., 69 Iowa 665, 27 Am. & Eng. R. Cas. 55, where a railroad company received for carriage a car overloaded with hogs without objection, and by reason of delay the hogs "piled up" and were injured, the company was held liable.

A carrier was held liable for injuries done to plants by frost upon a connecting line, it being shown that the injury would have been avoided had the goods been promptly delivered. *Michigan Cent. R. Co. v. Curtis*, 80 Ill. 324.

In the transportation of meat it has been held that a provision in a bill of lading that a carrier should not be liable for decay did not protect him from anything more than the decay due to the intrinsic tendency of the meat, and not from bad judgment of the captain in persisting in his voyage after breaking his shaft, when by turning back he might have saved the meat. The jury had found that it was negligence in the captain to persist in continuing his voyage under the circumstances. *Sherman v. Inman Steamship Co.*, 26 Hun (N. Y.), 107.

A railroad company receiving cattle for transportation must carry them with reasonable dispatch and is liable for an injury resulting from delay. *Gulf, etc.*, R. Co. v. *Ellison*, 70 Tex. 491, 7 S. W. 785; *Missouri Pac. R. Co. v. Cornwall*, 70 Tex. 611, 8 S. W. 312.

forward both at once.³⁰ And he is required to take notice of any marks upon the package containing the goods, which indicate the character of its contents.³¹ But a carrier by water is not required to suspend a voyage to care for the damaged goods to the probable injury of the remainder of the cargo.³²

§ 5. Where the loss or injury is the result of the acts of the shipper.

The carrier is not liable for losses which are shown to have resulted from omissions or acts of the shipper which are the proximate cause of the loss, or for losses caused by the wrongful conduct or fraud of the shipper. Such contributory negligence on the part of the shipper will excuse the carrier from liability,³³ as

30. *Marshall v. New York Cent. R. Co.*, 45 Barb. (N. Y.) 502, where the charge of the judge at Circuit that "where two kinds of property are delivered at the same time by different owners, one of which kind is perishable and the other not, preference is to be given to that which is perishable in transportation, and if either must wait, it must be that which is not perishable," was sustained on appeal. The court said: "The question how the carrier was employed, and how he used and employed his means of transportation during any given period when property was delayed, would always be a proper subject of inquiry, and that on this inquiry proof that his means of transportation were employed in transporting perishable property, in preference to other property received at the same time, would always be held a sufficient excuse for delay."

Where there is a great press of business, the carrier may discriminate in favor of perishable goods in determining which consignments it will carry first. *Michigan Cent. R. Co. v. Burrows*, 33 Mich. 6.

31. *Hastings v. Pepper*, 11 Pick. (Mass.) 41, where a box contained oil of cloves, and the mark held sufficient to notify the carrier was: "Glass—with care—this side up," the carrier was held bound to so carry. But an express company, in the transportation of brittle goods without notice of their character, was held not liable to the extent of common carriers. Bad faith, and suppression of the truth by the bailor, will relieve a common carrier of liability as insurer. *American Express Co. v. Perkins*, 42 Ill. 458.

32. *Notara v. Henderson*, L. R. 5 Q. B. 346; *The Steamboat Lynx v. King*, 12 Mo. 272, 49 Am. Dec. 135. See also, *Rogers v. Murray*, 3 Bosw. (N. Y.) 357; *The Propeller Niagara v. Cordes*, 21 How. (U. S.) 7; *The Steamboat America*, 8 Ben. (U. S.) 491; *The Gentleman*, 1 Blatchf. (U. S.) 196; *The Bark Gentleman*, 1 Olc. Adm. 110; *Blocker v. Whittenburg*, 12 La. Ann. 410.

33. *Wilson v. Hamilton*, 4 Ohio St. 722. See generally, *Contributory negligence of shipper*, chap. 13.

where goods are improperly marked by the consignor,³⁴ or improperly packed or loaded,³⁵ or where the shipper fails to inform the carrier of the character of the goods or of their value,³⁶ or fraudulently conceals the contents or value,³⁷ or where the loss or injury is due to the improper and unwarrantable interference of the shipper with the property.³⁸

§ 6. Where the loss or injury is the result of delay in the transmission of the goods.

The common law liability of the carrier as an insurer may be limited in cases of loss resulting from delay in the transportation and delivery of goods, occasioned by accident or misfortune not inevitable or produced by the act of God. But the carrier must exercise due discretion and reasonable care and diligence to guard against delay, and in forwarding the goods to their destination.³⁹

34. *Southern Express Co. v. Kaufman*, 59 Tenn. 161; *The Huntress*, 12 Fed. Cas. No. 61,914; *Conger v. Chicago, etc., R. Co.*, 24 Wis. 157. But the rule does not apply where the carrier's agent at the time he receives the goods has knowledge of the error. *O'Rourke v. Chicago, etc., R. Co.*, 44 Iowa, 526; *Forsythe v. Walker*, 9 Pa. St. 148.

35. *Ross v. Troy, etc., R. Co.*, 49 Vt. 364; *Loveland v. Burke*, 120 Mass. 139, 21 Am. Rep. 507.

36. *Oppenheimer v. United States Express Co.*, 69 Ill. 62; *Magnin v. Dinsmore*, 70 N. Y. 410; *Orange Co. Bank v. Brown*, 9 Wend. (N. Y.) 85; *Hollister v. Nowlen*, 19 Wend. (N. Y.) 234; *Hayes v. Wells, Fargo & Co.*, 23 Cal. 185; *Western Transp. Co. v. Newhall*, 24 Ill. 466; *Farmers' Bank v. Champlain Trans. Co.*, 23 Vt. 186.

37. *Chicago, etc., R. Co. v. Shea*, 66 Ill. 471.

38. *Roderick v. Railroad Co.*, 7 W. Va. 54; *Hutchinson v. Chicago, etc.,*

R. Co., 37 Minn. 524; *Conger v. Chicago, etc., R. Co.*, 24 Wis. 157.

39. *Geismer v. Lake Shore, etc., R. Co.*, 102 N. Y. 563, 55 Am. Rep. 837, 26 Am. & Eng. R. Cas. 287; *Wibbert v. New York, etc., R. Co.*, 12 N. Y. 245; *Blackstock v. New York, etc., R. Co.*, 20 N. Y. 48, 75 Am. Dec. 372; *Truax v. Philadelphia, etc., R. Co.*, 3 Houst. (Del.) 233; *Pittsburgh, etc., R. Co. v. Hollowell*, 65 Ind. 188, 32 Am. Rep. 63; *Gulf, etc., R. Co. v. Levi*, 76 Tex. 337, revg. 12 S. W. 677, 40 Am. & Eng. R. Cas. 115. The reasons upon which the common law doctrine that a common carrier is an insurer is based do not apply when the thing is actually transported and delivered, although, when delivered, it may be greatly diminished in value by a fall in the market price, or its value partially or entirely destroyed by reason of its inherent perishable nature, which has worked its partial or entire destruction while in transit.

If, in the exercise of due care and diligence, it does not appear that a change of route would prevent the loss attendant upon delay, he is not bound to divert the goods to a route over which he has no control. He may sell the goods for the best price he can obtain, in order to convert what would inevitably be a total loss into one that is partial merely.⁴⁰

§ 7. Where the loss or injury is caused by the exercise of public authority.

Where goods are delivered to a common carrier for shipment, and are levied upon or attached in the hands of the carrier upon a valid writ of attachment or execution or other legal process, by means of which the carrier is deprived of possession of the property by the officer who serves the writ, the carrier is not liable to the shipper for the non-delivery of the goods, provided the writ upon its face is a valid writ and from a court having competent jurisdiction to issue it, and he immediately notifies the shipper.⁴¹ But an attachment of the goods against one not the owner does not excuse the carrier from delivering.⁴² It is a good defense to an action against a common carrier for preventing the levy of an attachment upon property in its hands that the property does not belong to the defendant in the attachment.⁴³ A carrier is required to give prompt notice to the consignor or owner of goods, if known, of their seizure, or the institution of legal proceedings against them but is not held to a technical observance of the rule, if the owner has timely notice, and is in a position by the exercise of ordinary diligence to protect his title. That goods stolen or lost by reason of the negligence of a carrier while in its possession as warehouseman had been attached, and were in the custody of the law, does not relieve the carrier from liabil-

40. *American Ex. Co. v. Smith*, 33 Ohio St. 511.

41. *Bliven v. Hudson River R. Co.*, 36 N. Y. 403; *Adams v. Scott*, 104 Mass. 164. See also, cases cited under *Seizure by legal process*, chap. 7, §§ 5, 6, *post*.

42. *Edwards v. White Line Transit Co.*, 104 Mass. 159, 6 Am. Rep. 214; *Kiff v. Old Colony, etc., R. Co.*, 117 Mass. 591, 19 Am. Rep. 429.

43. *Simpson v. Dufour*, 126 Ind. 322, 26 N. E. 69; *Pingree v. Detroit, etc., R. Co.*, 66 Mich. 143, 11 Am. St. Rep. 479.

ity.⁴⁴ A common carrier is not liable for the value of fish shipped over its line which were seized by a game warden on the ground that the fish were illegally caught, where such warden had neither legal nor apparent legal right to seize the same.⁴⁵

§ 8. Liability of carriers of passengers.

Carriers of passengers are common carriers in respect to the baggage of their passengers and also in respect to their passengers and those desiring passage on their conveyances, but their liability to passengers for personal injuries is limited to cases where their negligence in the performance of their duties is the proximate cause of the injury; they are not insurers of the safety of their passengers.⁴⁶ A carrier of passengers who undertakes to carry goods for hire subjects himself to the liability of a common carrier of goods, in respect to such goods, except where the compensation is so grossly inadequate as to render the application of such a rule of liability unjust; in such a case he is liable merely as a bailee.⁴⁷

§ 9. Express companies.

The express business is a branch of the carrying trade.^{47a} Express companies undertaking to carry or cause to be carried goods for hire for all persons indifferently who choose to employ them, are common carriers.⁴⁸ Ordinarily carters and expressmen engaged

44. *Frank v. Central R. Co.*, 9 Pa. Super. Ct. 129.

45. *Merriman v. Great Northern Express Co.*, 63 Minn. 543, 65 N. W. 1080.

46. See *Carriers of passengers*, chap. 22.

47. *Bean v. Sturtevant*, 8 N. H. 146, 28 Am. Dec. 389.

47a. *Southern Exp. Co. v. St. Louis, etc., Ry. Co.*, 19 Fed. 210, 869.

48. *Belger v. Dinsmore*, 51 N. Y. 166, 10 Am. Rep. 575; *Landsberg v. Dinsmore*, 4 Day (N. Y.), 490; *Read v. Spaulding*, 5 Bosw. (N. Y.) 395, *affd.* 30 N. Y. 630, 86 Am. Dec. 426; *Place v. Union Express Co.*, 2 Hilt.

(N. Y.) 19, overruling *Hersfield v. Adams*, 19 Barb. (N. Y.) 577; *Sherman v. Wells*, 28 Barb. (N. Y.) 403; *Haslam v. Adams Express Co.*, 6 Bosw. (N. Y.) 235; *Southern Express Co. v. Ramey*, 51 So. 314 (Ala. 1909); *Brockway v. American Express Co.*, 168 Mass. 257, 47 N. E. 87; *Stadhecker v. Combes*, 9 Rich. L. (S. C.) 193; *Southern Express Co. v. Crook*, 44 Ala. 468, 4 Am. Rep. 140; *Southern Exp. Co. v. Hess*, 53 Ala. 19; *U. S. Exp. Co. v. Bachman*, 28 Ohio St. 144; *Southern Exp. Co. v. Womack*, 1 Heisk. (Tenn.) 256; *Southern Exp. Co. v. Glenn*, 16 Lea (Tenn.), 472; *Southern Exp. Co. v.*

in carrying freight to and from a depot or warehouse, or between places in the same locality, or between different localities, are common carriers.^{48a} An express or teaming company which owns horses and wagons and hires teamsters, by means of which merchandise is carried throughout a city for the public generally, is a common carrier within the meaning of an ordinance requiring the licensing of public carts, notwithstanding such express or teaming company exercises a discretion as to the persons whom it will serve.^{48b} A parcel delivery company is a common carrier.^{48c} Joint stock companies engaged in the express business and persons whose business it is to receive packages of bullion, coin, bank notes, commercial paper and such other articles of value as persons see fit to trust to their care for the purpose of transporting the same from one place to another for a compensation, are common carriers, and responsible as such for the safe delivery of property intrusted to them.⁴⁹ A city express company, engaged in carrying parcels

Newby, 36 Ga. 635, 91 Am. Dec. 783; *Bank of Kentucky v. Adams Exp. Co.*, 93 U. S. (3 Otto) 174; *Southern Exp. Co. v. McVeigh*, 20 Gratt. (Va.) 264; *Lowell Wire Fence Co. v. Sargent*, 8 Allen (Mass.) 189; *Buckland v. Adams Exp. Co.*, 97 Mass. 124, 93 Am. Dec. 68; *United States Exp. Co. v. Rush*, 24 Ind. 403; *Baldwin v. American Express Co.*, 23 Ill. 197, 74 Am. Dec. 199, 26 Ill. 504; *American Ins. Co. v. Pinckney*, 29 Ill. 392; *Guliver v. Adams Exp. Co.*, 38 Ill. 504; *Baker v. Maher*, Howell (Mich. N. P.), 39; *Christenson v. American Exp. Co.*, 15 Minn. 270, 2 Am. Rep. 122; *Verner v. Sweitzer*, 32 Pa. St. 208; *Kirby v. Adams Exp. Co.*, 2 Mo. App. 369. An expressman, who is duly licensed by the mayor of New York City, and who transports for hire the goods of all persons indifferently, is a common carrier and liable as such for a parcel stolen from

one of his wagons without the connivance of himself or driver. *Robinson v. Cornish*, 13 N. Y. Supp. 577, 34 St. Rep. (N. Y.) 695.

In Indiana express companies are made by statute common carriers. *American Exp. Co. v. Hackett*, 30 Ind. 250, 95 Am. Dec. 691.

48a. *Collier v. Langan & Taylor Storage & Moving Co.*, — Mo. App. —, 127 S. W. 435.

48b. *Hastings Express Co. v. City of Chicago*, 135 Ill. App. 268.

48c. *Johnson Express Co. v. City of Chicago*, 136 Ill. App. 368.

49. *Sweet v. Barney*, 23 N. Y. 335; *Russell v. Livingston*, 19 Barb. (N. Y.) 346, *revd. on another point*, 16 N. Y. 515; *Sherman v. Wells*, 23 Barb. (N. Y.) 403.

Under South Dakota Rev. Civ. Code, 1903, § 1577, providing that every one who offers to carry persons, property, or messages is a common car-

between the city of New York and Brooklyn, and in carrying trunks to and from the passenger depots of the various railroads, is a common carrier, and performs its duties under the responsibility of common carriers.⁵⁰ Persons carrying on a transportation business, under circumstances which, in law, constitute them common carriers, cannot divest themselves of that character, nor secure an exemption from its liabilities, by declaring in their bills of lading, etc., that they are not to be deemed common carriers. What they are is to be determined by the nature of their business.⁵¹ The fact that an express company, in their receipt for goods, style themselves "express forwarders," and agree to "forward" the goods, does not necessarily give them the character of simple forwarders, nor prevent them from being treated as common carriers.⁵² An express company receiving goods generally for transportation for hire, though it has no means for transportation of its own, employing the vehicles of other carriers for that purpose, is itself a common carrier.^{52a} Where an express company uses as its instrumentality of transportation the servants and rolling stock of a railroad company, it is a common carrier; and its status is not changed by an agreement with the shipper that it is to be held liable as a forwarder only, and not as a carrier.^{52b}

§ 10. Railroad companies.

Railroad companies, receiving from the State a delegation of a portion of its sovereign power for the public good, being public

rier of whatever he thus offers to carry, an express company offering to carry money for hire is a common carrier thereof. *Platt v. Lecocq*, 150 Fed. 391 (C. C. 1906).

50. *Richards v. Westcott*, 15 N. Y. Super. Ct. (2 Bosw.) (N. Y.) 589; *Parmalee v. Lowitz*, 74 Ill. 116.

51. *Bank of Kentucky v. Adams Exp. Co.*, 93 U. S. (3 Otto) 174, 23 L. Ed. 872; *Buckland v. Adams Exp. Co.*, 97 Mass. 124, 93 Am. Dec. 68; *Russell v. Livingston*, 19 Barb. (N. Y.) 346; *Place v. Union Exp. Co.*, 2 Hilt. (N. Y.) 27; *U. S. Exp. Co. v.*

Bachman, 28 Ohio St. 144. Compare *Hersfield v. Adams*, 19 Barb. (N. Y.) 577.

52. *Read v. Spaulding*, 18 N. Y. Super. Ct. 5 (Bosw.) 395, affd. 30 N. Y. 630, 86 Am. Dec. 426.

Nor calling themselves a "transportation company." *Mercantile Mut. Ins. Co. v. Chase*, 1 E. D. Smith (N. Y.) 115.

52a. *Christenson v. American Exp. Co.*, 15 Minn. 270 (Gil. 208), 2 Am. Rep. 122.

52b. *Galt v. Adams Exp. Co., McArthur & M.* (D. C.) 124.

agents, and, in the place and stead of the government, exercising public duties, being authorized by law to make roads as public highways, to lay down tracks, place cars upon them, and carry goods and passengers for hire, are, within all the rules of the common law, eminently common carriers of goods and passengers, possessed of all the rights, and subject to the liabilities and duties imposed by law upon common carriers of goods and passengers.⁵⁴ Whether or not a particular road is a common car-

53. Kirby v. Adams Exp. Co., 2 Mo. App. 369; Bank of Kentucky v. Adams Exp. Co., 93 U. S. 174; Read v. Spaulding, 5 Bosw. (N. Y.) 395; Buckland v. Adams Exp. Co., 97 Mass. 124, 93 Am. Dec. 68.

54. N. Y.—Weed v. Saratoga R. Co., 19 Wend. (N. Y.) 534; Root v. Great Western R. Co., 45 N. Y. 524; Camden, etc., R. Co. v. Burke, 13 Wend. (N. Y.) 611, 28 Am. Dec. 488.

U. S.—Winona, etc., R. Co. v. Blake, 94 U. S. 180, 24 L. Ed. 99; Atlantic & P. R. Co. v. Laird, 15 U. S. App. 248, 58 Fed. Rep. 760, 7 C. C. A. 489, railroads are quasi public highways, and all railroad corporations actively engaged in operating passenger trains are subject to the liabilities and duties imposed by law upon common carriers of passengers.

Ala.—Southwestern R. Co. v. Webb, 48 Ala. 585; Mobile, etc., R. Co. v. Prewitt, 46 Ala. 63, 7 Am. Rep. 586; Selma, etc., R. Co. v. Butts, 43 Ala. 385, 94 Am. Dec. 694.

Ark.—Eureka Springs R. Co. v. Timmons, 51 Ark. 459.

Cal.—Davis v. Button, 78 Cal. 247; Contra Costa, etc., R. Co. v. Moss, 23 Cal. 323, 533.

Colo.—Schloss v. Wood, 11 Colo. 287, 35 Am. & Eng. R. Cas. 492, note.

Conn.—Fuller v. Naugatuck R. Co., 21 Conn. 570.

Fla.—Johnson v. Pensacola, etc., R. Co., 16 Fla. 623, 26 Am. Rep. 731.

Ga.—Falvey v. Georgia R. Co., 76 Ga. 597, 2 Am. St. Rep. 58.

Ill.—Peoria, etc., R. Co. v. U. S. Rolling Stock Co., 28 Ill. App. 79; Chicago, etc., R. Co. v. Thompson, 19 Ill. 578.

Mass.—Thomas v. Boston, etc., R. Co., 10 Metc. (Mass.) 472, 43 Am. Dec. 444; Norway Plains Co. v. Boston, etc., R. Co., 1 Gray (Mass.) 263, 61 Am. Dec. 424.

Miss.—Southern Exp. Co. v. Thornton, 41 Miss. 216; Southern Exp. Co. v. Moon, 39 Miss. 822; Mississippi Cent. R. Co. v. Kennedy, 41 Miss. 671; Const. of Mississippi, § 184.

N. H.—Elkins v. Boston, etc., R. Co., 3 Fost. (N. H.) 275.

N. J.—Rogers Locomotive, etc., Works v. Erie R. Co., 5 C. E. Greene (N. J.) 379, 20 N. J. Eq. 379; Messenger v. Pennsylvania R. Co., 36 N. J. L. 407, 13 Am. Rep. 457.

Ohio.—Scofield v. Lake Shore, etc. R. Co., 43 Ohio St. 571, 23 Am. & Eng. R. Cas. 612.

Or.—Thompson-Houston Electric Co. v. Simon, 20 Or. 60, 23 Am. St. Rep. 86, 47 Am. & Eng. R. Cas. 51.

Penn.—Eagle v. White, 6 Whart. (Pa.) 505; Sandford v. Catawissa, etc., R. Co., 24 Pa. St. 378, 64 Am. Dec. 667.

rier in a certain case is a mixed question of law and fact.⁵⁵ A railroad company, operating a road belonging to the State, is liable as a carrier for negligence of State officers in the performance of duties connected with the road. Thus it will be liable as a common carrier, for an injury sustained by a passenger from the collision of two of its trains passing in the same direction, though the motive power of the road was furnished by the State and under the control of the State's agent, and though the accident happened through the negligence of the agents of the State.⁵⁶ Railroad companies in the transportation of animals are liable as common carriers.⁵⁷ A common carrier of goods which transports live stock is as to the latter property also a common carrier.^{57a} Under New Hampshire Pub St. 1901 c. 160, §§ 21-23, providing that every railroad corporation which shall contract for the transportation of milk in large quantities shall establish a tariff for its transportation by the can, it seems that a railroad company becomes a common carrier of milk on entering into a contract with a firm to furnish it with special cars for the transportation of milk.^{57b} A railroad, which serves business houses located along a spur track by delivering to them cars of freight and cars to be freighted and shipped, is a common carrier with respect to the use it makes of the track, and

S. C.—*Piedmont Mfg. Co. v. Columbia, etc., R. Co.*, 19 S. C. 353, 16 Am. & Eng. R. Cas. 194; *Avinger v. South Carolina R. Co.*, 29 S. C. 265, 13 Am. St. Rep. 716, 35 Am. & Eng. R. Cas. 524; *Dill v. South Carolina R.*, 7 Rich. Law (S. C.), 158, 62 Am. Rep. 407; *Ex parte Benson*, 18 S. C. 42.

Tenn.—*East Tennessee, etc., R. Co. v. Nelson*, 1 Cold. (Tenn.) 272.

Vt.—*Kimball v. Rutland, etc., R. Co.*, 26 Vt. 247, 62 Am. Dec. 567; *Jones v. Western Vermont R. Co.*, 27 Vt. 399; *Noyes v. Railroad*, 27 Vt. 110.

Eng.—*Pegler v. Monmouthshire R. Co.*, 30 L. J. Exch. 249, 6 H. & N. 644; *Palmer v. Grand Junction R. Co.*, 4 M. & W. 749, 1 H. & H. 489, 7

D. P. C. 232; *Crouch v. London, etc., R. Co.*, 23 L. J. C. P. 73, 14 C. B. 255, 78 E. C. L. 255; *Richards v. London, etc., R. Co.*, 18 L. J. C. P. 251, 7 C. B. 839, 62 E. C. L. 839.

55. *Elkins v. Boston, etc., R. Co.*, 23 N. H. 275; *Avinger v. South Carolina R. Co.*, 29 S. C. 265, 35 Am. & Eng. R. Cas. 519; *Piedmont Mfg. Co. v. Columbia, etc., R. Co.*, 19 S. C. 353, 16 Am. & Eng. R. Cas. 194.

56. *Ryland v. Peters*, 5 Pa. Law G. Rep. 126.

57. *Union Pac. R. Co. v. Rainey (Colo.)*, 34 Pac. 986.

57a. *Central of Georgia Ry. Co. v. Hall*, 124 Ga. 322, 52 S. E. 679.

57b. *Baker v. Boston & M. R. Co.*, 74 N. H. 100, 65 Atl. 386.

is, as such, bound to treat the houses located along the track without discrimination, and cannot discontinue its service as to one and continue it as to others.^{57c} A person transporting passengers for hire upon a railroad operated by him is a common carrier.⁵⁸ A railroad company operating its trains over another's road at the time of an accident is liable at common law as a common carrier.⁵⁹ A railroad company receiving freight before the road is completed, and when it is only running construction trains, has been held liable as a common carrier therefor.⁶⁰ A railroad company, which charges for the transportation of cattle, but permits the shipper to travel on a free pass upon the cars to take care of the cattle, is a common carrier for hire, both as to passenger and cattle.⁶¹ Railroad companies are common carriers under the common law, and, when made so by general statute or by their charters, these provisions are held to be merely declaratory of the existing law, rather than introducing any new rule of law.⁶² Railroad companies are common carriers of passengers, but their liability as such is not that of an insurer of the safe transportation of the passenger; they are liable, however, for the exercise of the highest degree of care and diligence practicable to protect passengers from injury.⁶³ Such companies incur the ordinary responsibility of a common carrier with respect to the baggage of passengers, and all property accepted by them as such with knowledge of its character, although not properly baggage; and nothing but inevitable accident or the act of

57c. *W. C. Agee & Co. v. Louisville & N. R. Co.* — Ala. —, 37 So. 680.

58. *Davis v. Button*, 78 Cal. 247, 20 Pac. 545.

59. *Eureka Springs R. Co. v. Timmons*, 51 Ark. 459, 11 S. W. 690. See *One railroad transporting the cars of another*, § 14, *ante*.

60. *Little Rock, etc., R. Co. v. Glidewell*, 39 Ark. 487, 18 Am. & Eng. R. Cas. 539.

61. *Maslin v. Baltimore & O. R. Co.*, 14 W. Va. 180.

62. *Root v. Great Western R. Co.*, 45 N. Y. 524; *Chicago, etc., R. Co. v. Thompson*, 19 Ill. 578.

63. *Thompson-Houston Elec. Co. v. Simon*, 20 Or. 60, 47 Am. & Eng. R. Cas. 51; *Nashville, etc., R. Co. v. Messino*, 1 Sneed (Tenn.) 220; *Shoemaker v. Kingsbury*, 12 Wall. (U. S.) 369; *Murch v. Concord R. Corp.*, 29 N. H. 9, 61 Am. Dec. 631, a railroad company is a carrier of passengers only as to its passenger trains. It does not become such a carrier as to its freight trains, although it may occasionally carry passengers on them as a matter of accommodation, and although in such cases it charges the usual fare. See also, *Carriers of passengers*, chap. 22.

the public enemy, will excuse them for a loss of, or injury to, it.⁶⁴ They are liable for goods received for transportation on passenger trains, knowing it not to be baggage, whether the freight was paid in advance or not;⁶⁵ but not for such goods received without authority and carried without compensation by a conductor⁶⁶ or for goods, not baggage, received as such without knowledge of its character.⁶⁷ As to branch lines constructed by a railroad company, their liability as common carriers depends upon the question as to whether such branch lines are actually used for purposes of general transportation, or for private purposes of their own.⁶⁸ As *quasi* public agents, railroad companies are subject to special limitations by law as to their rates and charges for transporting freight and passengers, and as to the manner in which they discharge their public duties.⁶⁹ The courts will take judicial notice of the fact that a railroad company is a common carrier where a statute declares it to be such, and allegation and proof of such fact is unnecessary.⁷⁰ Railroad companies are common carriers engaged in public employment affecting the public interest, and are subject to legislative control as to charges like any natural person who is a common carrier.^{70a}

64. *Burnell v. New York Cent. R. Co.*, 45 N. Y. 184; *Merrill v. Grinnell*, 39 N. Y. 594; *Camden, etc., R. Co. v. Burke*, 13 Wend. (N. Y.) 611, 28 Am. Dec. 488; *Hollister v. Nowlen*, 19 Wend. (N. Y.) 234; *Cole v. Goodwin*, 19 Wend. (N. Y.) 251; *Powell v. Myers*, 26 Wend. (N. Y.) 591. See also, *Carriers of passengers*, chap. 22.

65. *Butler v. Hudson River R. Co.*, 3 E. D. Smith (N. Y.), 571; *Langworthy v. New York, etc., R. Co.*, 2 E. D. Smith (N. Y.), 195.

66. *Elkins v. Boston, etc., R. Co.*, 23 N. H. 275.

67. *Humphreys v. Perry*, 148 U. S. 627, 54 Am. & Eng. R. Cas. 29, 7 Am. R. & Corp. Rep. 686, 13 Sup. Ct. 711, 37 L. Ed. 587, 47 Alb. L. J. 386, wherein it was held that a passenger could not recover for the loss of a

stock of jewelry contained in a trunk presented to the baggage agent as his personal baggage, unless the loss occurred through gross negligence.

68. *Schloss v. Wood*, 11 Colo. 287, 35 Am. & Eng. R. Cas. 492; *Avinger v. South Carolina R. Co.*, 29 S. C. 265, 13 Am. St. Rep. 716, 35 Am. & Eng. R. Cas. 526.

69. *Scofield v. Lake Shore, etc., R. Co.*, 43 Ohio St. 571, 54 Am. Rep. 846, 23 Am. & Eng. R. Cas. 612; *Norway Plains Co. v. Boston, etc., R. Co.*, 1 Gray (Mass.) 263, 61 Am. Dec. 423.

70. *Caldwell v. Richmond, etc., R. Co.*, 89 Ga. 550; *Denver, etc., R. Co. v. Cahill*, 8 Colo. App. 158.

70a. *Laurel Fork, etc., R. Co. v. West Virginia Transp. Co.*, 25 W. Va. 324; *West Virginia Transp. Co. v. Sweetzer*, 25 W. Va. 434.

§ 11. Receivers and assignees of railroad company operating the road.

The receiver and assignee in bankruptcy of a railroad corporation, who operates the road under the order of the court, is not personally liable for an injury caused by the negligence of a servant employed by him, in the absence of evidence that he was negligent in the selection of servants, or that he held himself out as operating the road otherwise than as receiver.⁷¹ Where such an officer displaces the directors or other body who by its charter are authorized to manage its affairs, and, under the direction of the court by which he is appointed, has the sole control of its property and effects, and, when authorized so to do, the executive power to use its franchises, he is responsible for his conduct in all these things to the court appointing him. In such a case the remedy for injuries resulting from his negligence, or the negligence of those operating a railroad under him, would be by application to the same tribunal, which might itself dispose of the matter by administering justice between the parties, or allowing the party aggrieved to bring his suit at law for the alleged injury.⁷² Dam-

71. *Cardot v. Barney*, 63 N. Y. 281, 20 Am. Rep. 533; *Murphy v. Holbrook*, 20 Ohio St. 137; *Potter v. Bunnell*, 20 Ohio St. 150; *Henderson v. Walker*, 55 Ga. 481.

In *Cardot v. Barney*, *supra*, the court says: "The defendant was not individually the owner, or possessed of the property; he had neither a general or special property in the road or its earnings. The property was in the court for management and administration; and the defendant was an officer of the court, obeying its orders and carrying out its directions. His relation to the road and its operation was entirely official, and he had no interest in or control over the earnings, and was removable at the pleasure of the court. He was expressly authorized to employ all necessary assistants and laborers and

operate the road. In the employment of subordinates, as well as in the other acts connected with the operation of the road, he acted officially and as the representative of, and by orders from the court, and was only held to diligence and good faith in the performance of any act which he was authorized to do. There is no evidence that he at any time assumed to act other than as receiver or assignee, or held himself out as a carrier of passengers, save as an officer of the court. I know of no principle upon which a receiver or other officer of a court, having no interest in the prosecution of the work and deriving no profit from it, should be answerable except for his own acts and neglects."

72. *Kain v. Smith*, 80 N. Y. 468; *Metz v. Buffalo, Corry & P. R. Co.*,

ages for injury to the person, whether passenger or employe, for loss of goods in the course of transportation, or otherwise, would be chargeable upon, and payable out of the fund in court, the same as other expenses of administration.⁷³ But where a receiver is in possession of and operating a leased road not as an officer of any court or by its authority, but by virtue of a contract simply permitted by the court, he is not protected by being a receiver, but is liable like an individual for injuries resulting from his negligence, or the negligence of his employes in the operation of the road.⁷⁴ And, while a court of equity will protect persons acting under its process or authority, in the execution of a decree or decretal order, against suits at law, and will compel parties to apply to that court for relief, this protection is accorded by that court to its officers only on their own application, and is granted in the exercise of the court's discretion, and it is presumed that it would be granted in any necessary or proper case; waving this right to invoke the aid of the court, they are amenable in the common law courts to actions for negligence as common carriers.⁷⁵ And the mere fact that persons are acting as receivers, under the appointment of a court of equity, cannot be recognized as a defense to a suit at law for a breach of any obligation or duty which was fairly and voluntarily assumed by them in matters of business conducted or carried on by them while acting as such receivers.⁷⁶ Upon

58 N. Y. 61, 17 Am. Rep. 201; *Morse v. Brainerd*, 41 Vt. 551; *Klein v. Jewett*, 26 N. J. Eq. 474; *Little v. Dusenberry*, 46 N. J. L. 614, 50 Am. Rep. 445, 31 Alb. L. J. 490. See also, *Village of Carterville v. Cook*, 129 Ill. 152, 16 Am. St. Rep. 248, 4 L. R. A. 721; *Rogers v. Wendell*, 54 Hun (N. Y.), 543.

73. *Klein v. Jewett*, *supra*; *Cowdrey v. G. H. & H. R. Co.*, 93 U. S. 352.

74. *Kain v. Smith*, 80 N. Y. 468, citing *Rogers v. Wheeler*, 43 N. Y. 598; *Sprague v. Smith*, 29 Vt. 421, 70 Am. Dec. 424; *Barter v. Wheeler*, 49 N. H. 9, 6 Am. Rep. 434; *Blum-*

enthal v. Brainerd, 38 Vt. 409, 91 Am. Dec. 350; *Paige v. Smith*, 99 Mass. 395; *Murphy v. Holbrook*, 20 Ohio St. 137.

75. *Blumenthal v. Brainerd*, 38 Vt. 402, 91 Am. Dec. 350; *Newell v. Smith*, 49 Vt. 260; *Paige v. Smith*, 99 Mass. 395; *Nichols v. Smith*, 115 Mass. 332; *Ballou v. Farnum*, 9 Allen (Mass.) 47; *Barter v. Wheeler*, 49 N. H. 9, 6 Am. Rep. 434; *Lamphear v. Buckingham*, 33 Conn. 237.

76. *Blumenthal v. Brainerd*, 38 Vt. 402, 91 Am. Dec. 350, in which the court says: "The assumption by the defendants of the peculiar duties and extraordinary responsibilities arising

principle and authority, it has been held, a receiver, operating a railroad under the order of a court of equity, stands in respect to duty and liability, just where the corporation would, were it operating the road, and the question whether or not the receiver is liable for negligence must be tested by the same rules that would be applied if the corporation was the actual party defendant before the court.⁷⁷ A receiver of a railroad, operating the same, is a common carrier, within the Hours of Labor Law.^{77a}

§ 12. Trustees of mortgage bonds of railroad company.

The trustees of a mortgage, given to secure the bonds of a railroad company, who have possession and control of and actually operate the road for the benefit of their bondholders, are personally liable as common carriers of goods for the loss of goods transported over the road under their management.⁷⁸ The trustees of an insolvent railroad company who operate the road are liable for loss of goods as common carriers.⁷⁹ The cases cited proceeded upon the ground that the defendants were the owners of the roads, and were bound personally by their contracts; and that the fact was unimportant that they were trustees and acted in a representative capacity. The actions were upon contracts made by the defendants, and, as in the case of executors and administrators,⁸⁰ they were held liable to answer for them. The legal title to the road was in the defendants, and they operated them as proprietors, and

from the relation of common carriers is not to be considered as necessarily, if at all, incompatible with any duty or responsibility imposed upon them as receivers. The plaintiff's evidence tended to show that the defendants were managing and controlling a long line of railroad, and conducted and held themselves out as common carriers over that line. If in fact they were common carriers over that line of railroad, we think that it is no defense to an action at law for a breach of a duty or obligation arising out of business intrusted to them in that relation, that they were running and managing the line of rail-

road as receivers under an appointment of the Court of Chancery." See also, cases cited under last preceding note.

77. *Klein v. Jewett*, 26 N. J. Eq. 474.

77a. *United States v. Ramsey*, 197 Fed. 444.

78. *Rogers v. Wheeler*, 2 Lans. (N. Y.) 486, *affd.* 43 N. Y. 598; *Sprague v. Smith*, 29 Vt. 421, 70 Am. Dec. 424; *Barter v. Wheeler*, 49 N. H. 9, 6 Am. Rep. 434.

79. *Faulkner v. Hart*, 44 N. Y. Super. Ct. 471, *revd.* 82 N. Y. 413, on other grounds.

80. *Ferrin v. Myrick*, 41 N. Y. 315.

their liability legitimately resulted from their proprietorship, although the title was in trust for others. They were in no sense receivers or officers of the court. They had assumed to operate the roads, and had made contracts with the public in the course of that business, and there was no principle or policy that would shield them from liability if they failed to perform their engagements.⁸¹ Likewise such trustees and mortgagees in trust for the bondholders, in possession of and operating the roads as such trustees and mortgagees, are liable for injuries sustained by reason of the negligence of persons employed by them. They are regarded as the owners of the road, and the real principals receiving the earnings, and having the benefit of the services of the employes. The employes are the servants of the defendants operating the roads in virtue of the title and possession acquired under their mortgages; and whether a road is operated by mortgagees in possession, trustees, lessees or intruders, is not material, so long as they assume to operate the road and take the earnings either for themselves or those they represent.⁸² Where certain railroad companies carried on the business of common carriers of goods for hire, under the name of an association, and thereby acquired great gains and profits, it was held that they were liable as trustees to one who had obtained a judgment against the association for breach of duty in transporting his goods.⁸³

§ 13. Street railroad companies.

Street railroad companies are common carriers, and liable, like

81. See cases cited, note 78.

82. *Ballou v. Farnum*, 9 Allen (Mass.), 47; *Lamphear v. Buckingham*, 33 Conn. 237; *Sprague v. Smith*, 29 Vt. 421, 70 Am. Dec. 424, wherein the question was, whether the defendants were personally liable upon the contracts made by the operatives on the road, or for their negligence or misconduct, while they continued to operate the road, and received freight and pay for carrying passengers for the benefit of the *cestuis que trust*, and the court held

that it could "see no reason why the defendants were not liable to the same extent as the company would have been, and upon similar grounds to those upon which lessees, or any others exercising the franchises of the company, for the time, must be; that is, that they are the ostensible parties, who appear to the public to be exercising the franchise of the company."

83. *Clarkson v. Erie & North Shore Dispatch*, 6 Ill. App. 284.

other common carriers, upon common law principles. They are always common carriers of passengers for hire, with rights, duties, and liabilities similar to those of general railroad companies. As such, they are required to exercise the highest degree of care, skill, diligence, and foresight consistent with their business for the safety of their patrons, and are liable for the slightest negligence causing injury or loss of life to their passengers.⁸⁴ They may be common carriers of goods, also, when expressly authorized by statute, or when organized under general laws not limiting their

84. *Lincoln Traction Co. v. Heller*, 72 Neb. 127, 3 St. Ry. Rep. 582, 100 N. W. 197, 102 N. W. 262; *Spellman v. Lincoln Rap. Trans. Co.*, 36 Neb. 890, 55 N. W. 270, 20 L. R. A. 316; *Lincoln St. R. Co. v. McClellan*, 54 Neb. 672, 74 N. W. 1074; *Topeka City R. Co. v. Higgs*, 38 Kan. 375; *Meier v. Pennsylvania R. Co.*, 64 Pa. St. 225; *Indianapolis, etc., R. Co. v. Horst*, 93 U. S. 291, 23 L. Ed. 898, 3 Am. Rep. 581; *Dean v. Chicago G. R. Co.*, 64 Ill. App. 165, 1 Chic. L. J. Wkly. 213, 28 Chic. Leg. N. 289; *Citizens St. R. Co. v. Merl*, 134 Ind. 609, 33 N. E. 1014; *East Omaha St. R. Co. v. Godola*, 6 Am. Electl. Cas. 424, 50 Neb. 906, 70 N. W. 491, 7 Am. & Eng. R. Cas. N. S. 300; *Thompson-Houston Elec. Co. v. Simon*, 20 Oreg. 60, 47 Am. & Eng. R. Cas. 51; *Citizens St. R. Co. v. Twiname*, 111 Ind. 587; *Holly v. Atlanta St. R. Co.*, 61 Ga. 215, 7 Rep. 360. See *Nellis' St. Rd. Acct. Law*, pp. 1, 12, 13 and notes; *Nellis on Street Railways*, § 6 and notes.

Railway companies are bound to use reasonable care and diligence in the conveyance of passengers; but they are not common carriers of passengers, and are not under obligation to carry safely. *East Indian Railway v. Kalidas Mukerjee*, 70 L.

J. P. C. 396, 63 App. Cas. 396, 84 L. T. 210.

The highest degree of care and diligence is due to a passenger who has paid for a continuous passage, while he remains in or within the sphere of a transfer car supplied by the company for making transfers from one line to another. *Citizens St. R. Co. v. Merl*, 134 Ind. 609, 33 N. E. 1014.

The fact that a street railway is being operated by a construction company, under its contract to operate the road satisfactorily for ten days before delivery to the street railway company, is not a defense in an action against the latter for personal injury, received by a passenger upon a car in use for the purposes of traffic. *Cogswell v. West St. & N. E. Elec. R. Co.*, 5 Wash. 46, 52 Am. & Eng. R. Cas. 500, 7 Am. R. & Corp. Rep. 48, 31 Pac. 411.

A street railway company assumes the relation of a common carrier by undertaking the transportation of passengers for hire, although its road may be constructed over private property. *East Omaha St. R. Co. v. Godola*, 6 Am. Electl. Cas. 424, 50 Neb. 906, 70 N. W. 491, 7 Am. & Eng. R. Cas. N. S. 300.

powers, or, under special circumstances, when organized only for the purpose of carrying passengers.⁸⁵

§ 14. One railroad transporting cars of another.—Terminal railroads.

A terminal railroad company owning no cars of its own and transporting only the railroad cars of other companies is a common carrier of personal property.^{85a} A stockyards company owning stockyards and doing what is known as a terminal business, owning switch tracks encircling the stockyards, and connecting therewith, and connecting with the trunk line railroads, so that all cars of live stock in and out from the stockyards must pass over its lines or switches, over which it alone moves the cars with its own locomotives and crews, which issues no bills of lading, and receives no part of the freight charges paid to the trunk line companies, but receives \$1 for each car moved from the connection of the trunk lines to the stockyards or the packing houses, is a railroad company and a common carrier for hire.^{85b} A railroad company that contracts to furnish the motive power to draw the passenger and freight cars of another with their contents over its road, assumes the liabilities of a common carrier in respect thereto, and is liable as a common carrier for loss or injury to certain cars and their

85. *Thompson-Houston Elec. Co. v. Simon*, 20 *Oreg.* 60, 47 *Am. & Eng. R. Cas.* 51, 25 *Pac.* 147; *Levi v. Lynn*, etc., *R. Co.*, 11 *Allen (Mass.)*, 300, 87 *Am. Dec.* 713. In the case last cited, in an action to recover damages against a street railway company for the loss of merchandise delivered to one of its conductors for transportation on the platform of a car, for which money was paid by the owner to the conductor, the testimony of two other persons that they had paid money at other times to the defendant's conductors for the like transportation of merchandise, with the knowledge of the superintendent of the road, was held competent evidence

to show, and, in the absence of anything to control or contradict it, sufficient evidence to warrant a jury in finding, that the defendants had assumed the business of common carriers of merchandise on their cars. See *Nellis' St. Rd. Acct. Law*, pp. 1, 12, 13 and notes. See also, *Spellman v. Lincoln Rap. Trans. Co.*, *supra*; *Citizens St. R. Co. v. Twiname*, *supra*.

85a. *United States v. Sioux City Stock Yards Co.*, 162 *Fed. (C. C.)* 556, *judg. affd.* 167 *Fed. (C. C. A.)* 126 (Iowa 1908).

85b. *United States v. St. Joseph Stockyards Co.*, 181 *Fed.* 625 (*D. C. Mo.* 1909).

contents, even though destroyed by fire or caused by a defect in the track of the transporting company, arising from a cause beyond its control.⁸⁶ So, where a railroad company is bound by statute to haul the cars of another company, and, having received a car to be hauled to a certain point, it, without authority, hauls it to another point, where it is destroyed by fire, it incurs the liability of a common carrier.⁸⁷ If a railroad company takes a car for transportation over their road, and, though it remains on its own tracks, take sole possession and care of it, they are responsible as common carriers.⁸⁸ It has been held that when the railroad com-

86. *Missouri Pac. R. Co. v. Chicago, etc., R. Co.*, 25 Fed. 317, 23 Am. & Eng. R. Cas. 718; *Hannibal, etc., R. Co. v. Swift*, 79 U. S. (12 Wall.) 262, 20 L. Ed. 423; *East St. Louis, etc., R. Co. v. Wabash, etc., R. Co.*, 123 Ill. 594, 32 Am. & Eng. R. Cas. 522, revg. 24 Ill. App. 279; *Peoria, etc., R. Co. v. United States Rolling Stock Co.*, 136 Ill. 643, 29 Am. St. Rep. 348, 49 Am. & Eng. R. Cas. 81, revg. 28 Ill. App. 79; *Austin v. St. Louis, etc., Packet Co.*, 15 Mo. App. 197. But if destroyed by fire after delivery to the consignee, or after they have been tendered to him, the company is not liable if not in fault. In the latter case its duties are only those of warehousemen. *Missouri Pac. R. Co. v. Chicago, etc., R. Co.*, *supra*; *Mallory v. Tioga, etc., R. Co.*, 39 Barb. (N. Y.) 488, *affd.* 32 How. Pr. (N. Y.) 616; *Vermont, etc., R. Co. v. Fitchburg R. Co.*, 14 Allen (Mass.), 460, 92 Am. Dec. 785; but where the contract provided that the company owning the cars agreed to save the transporting company harmless from all claims and expenses arising from any injury to passengers, or loss or damage of baggage, goods, and freight, while in transit over their road unless occasioned by the negligence or default of the

transporting company, in which case the loss or damage should be borne by the latter, it was held that the latter, although liable as common carriers, were not liable on the contract.

Hauling engines.—A railroad company which agrees for a stipulated compensation to draw another company's engines over its line, and furnishes an employe to act as pilot, he having the exclusive control of the movement of the engines, is liable for their destruction in a collision caused by his negligence in moving them, although the company owning them furnishes an engineer and fireman to operate them under the pilot's direction. *Terre Haute, etc., R. Co. v. Chicago, etc., R. Co.*, 150 Ill. 502, 37 N. E. 915.

87. *Peoria, etc., R. Co. v. Chicago, etc., R. Co.*, 109 Ill. 135, 50 Am. Rep. 605, 18 Am. & Eng. R. Cas. 506.

88. *New Jersey R. Co. v. Pennsylvania R. Co.*, 27 N. J. L. (3 Dutch.) 100.

89. *East Tennessee, etc., R. Co. v. Whittle*, 27 Ga. 535, 73 Am. Dec. 741; *Ohio, etc., R. Co. v. Dunbar*, 20 Ill. 623. See also, *Kimball v. Rutland, etc., R. Co.*, 26 Vt. 247, 62 Am. Dec. 567.

pany merely furnishes the motive power and the roadbed, and contracts to haul the cars of the shipper, it is not liable as a common carrier of the goods in such cars, but that it is liable only for losses resulting from its negligence.⁸⁹ But it is held that this rule should prevail only when it appears that all control over the goods was taken from the carrier and confided to agents of the shipper.⁹⁰

§ 15. Transportation or dispatch companies.

A transportation company not owning or controlling any means of conveyance itself, but engaging on its own behalf in the business of transporting goods through the agency and over the lines of other carriers of its own selection and employment, is a common carrier, and subject to all the responsibilities attaching to that character.⁹¹ The duties which it undertakes and which it holds itself out to the public as willing to undertake and perform give it that character. In many cases it has been expressly adjudged to be a common carrier, and in others such has been assumed to be its character without a discussion of the question.⁹² Such a

90. *Mallory v. Tioga R. Co.*, 39 Barb. (N. Y.) 488; *New Jersey, etc., R. Co. v. Pennsylvania R. Co.*, 27 N. J. L. 100, wherein it was said: "The point was incidentally made . . . that this was not a case of carrying at all, but was analogous to that of towing a boat upon a water navigation, where the party supplying the motive power does not receive the boat into his custody or exercise any control over it other than such as results from the act of towing; in which case it has been held that the common law liability of a carrier does not attach. *Caton v. Rumney*, 13 Wend. (N. Y.) 387. This doctrine has been denied or doubted in *Smith v. Pierce*, 1 La. 349. But however the rule may be in the cases of towing boats under these circumstances, the analogy does not hold good in

the present case. Here the defendants received the car to take over their road and had exclusive charge of it, though they took it on its own tracks."

91. *Merchants Dispatch Transp. Co. v. Bloch*, 86 Tenn. 392, 6 Am. St. Rep. 847, 6 S. W. 881; *Merchants Despatch, etc., Co. v. Comforth*, 3 Colo. 280, 25 Am. Rep. 757; *Mercantile Mut. Marine Ins. Co. v. Chase*, 1 E. D. Smith (N. Y.), 115, a company doing business under the name of a "transportation company" is to be held liable as a common carrier, if it in fact transacts business as such.

92. *Robinson v. Merchants Despatch Transp. Co.*, 45 Iowa 470; *Stewart v. Merchants Despatch Transp. Co.*, 47 Iowa 229, 29 Am. Rep. 476; *Wilde v. Merchants De-*

company cannot stipulate for exemption from liability for damages to goods caused by the default of its agents, the sub-carriers.⁹³

§ 16. Express freight lines.

An express freight company which received goods for transportation but unreasonably delayed shipping them, and meanwhile they were injured by an extraordinary flood, was held liable as a common carrier for the loss occasioned. A common carrier, in order to claim exemption from liability for damage done to goods in his hands in course of transportation, though injured by what is deemed the act of God, must be without fault himself; his act or neglect must not concur and contribute to the injury. If he departs from the line of duty and violates his contract, and while thus in fault, and in consequence of the fault, the goods are injured by the act of God, which would not otherwise have caused the injury, he is not protected.⁹⁴

§ 17. Owners of canal boats.

Owners of canal boats, employed in the transportation of merchandise or other property, for hire, are common carriers when they hold themselves out as willing to carry for all persons indifferently.⁹⁵ But the owner of a canal boat, generally used only

spatch Transp. Co., 47 Iowa, 247, 29 Am. Rep. 479; Bancroft v. Merchants Despatch Transp. Co., 47 Iowa, 262, 29 Am. Rep. 482; Merchants Despatch Transp. Co. v. Bolles, 80 Ill. 473.

93. Merchants Despatch Transp. Co. v. Bloch, 86 Tenn. 392, 6 Am. St. Rep. 847, 6 S. W. 881.

94. Read v. Spaulding, 5 Bosw. (N. Y.) 395, affd. 30 N. Y. 630. See also, Michaels v. New York Cent. R. Co., 39 N. Y. 564; Whitworth v. Erie Ry. Co., 87 N. Y. 419; Reed v. United States Express Co., 48 N. Y. 470; Beach v. Raritan, etc., R. Co., 37 N. Y. 468. Compare Morrison v. Davis, 20 Pa. St. 171, 57 Am. Dec. 695; Denny v. New York Cent. R.

Co., 13 Gray (Mass.), 481, 74 Am. Dec. 645.

95. Arnold v. Halenbake, 5 Wend. (N. Y.) 33; Parsons v. Hardy, 14 Wend. (N. Y.) 215, 28 Am. Dec. 521; DeMott v. Laraway, 14 Wend. (N. Y.) 225, 28 Am. Dec. 523; Bowman v. Teall, 23 Wend. (N. Y.) 306, 35 Am. Dec. 562; Fuller v. Bradley, 25 Pa. St. 120; Humphrey v. Read, 6 Whart. (Pa.) 435; Spencer v. Daggett, 2 Vt. 92; Harrington v. Lyles, 2 Nott & M. (S. C.) 88; Hyde v. Trent Nav. Co., 5 T. R. 389; Trent Nav. Co. v. Wood, 3 Esp. N. P. 127; Williams v. Branson, 5 N. C. (1 Murph.) 417, 4 Am. Dec. 562, freighters on navigable rivers are common carriers.

in transporting his own merchandise, applying to a common carrier, who has knowledge of the facts, and receiving a load of freight which he enters into a contract to transport for an agreed price, does not thereby become liable for it as a common carrier. It is the business of carrying goods for others, not a single act, known to the consignor to be outside of the usual employment, which fixes the liability of a common carrier.⁹⁶ A canal boat hired at a daily rate for use in storing grain about the harbor, to be subject wholly to the control of the hirer in respect to loading, unloading, navigation, and delivery of cargo, is not a carrier or a warehouse, and is not liable for a shortage in cargo by a sale thereof by a man whose services in taking care of the boat were included in its hire, but who, though called "captain," had nothing to do with the cargo or navigation.⁹⁷

§ 18. Owners of tow boats towing water craft on the Mississippi.

The courts of Louisiana have held that a towboat used in towing barges or other water craft, which are loaded with freight, from one point to another on the Mississippi River, is a common carrier. Persons owning such a tow boat, who undertake to tow a barge, loaded with freight or merchandise, from one given point to another, first giving a bill of lading for the transportation of the cargo on board of the barge, are liable for the delivery of the cargo at the port of destination, the same as if it had been placed on board the tow boat herself.⁹⁸ Owners of tow boats have also been held to be common carriers in certain other jurisdictions.⁹⁹

96. *Fish v. Clark*, 49 N. Y. 122, affg. 2 Lans. 176; *Flautt v. Lashley*, 36 La. Ann. 106, wherein it was held that a boat used by its owners for their own purposes and those of others who agree to pay certain rates for the transportation of their goods from one point to another, and which is not shown to have been held out as a common carrier, cannot be declared to be such at the instance of one of the agreeing parties. See also, *Beckwith v. Frisbie*, 32 Vt. 559.

97. *The Daniel Burns* (D. C. S. D.

N. Y.), 52 Fed. Rep. 159, affd. 56 Fed. Rep. 605.

98. *Bussey & Co. v. Mississippi Val. Transp. Co.*, 24 La. Ann. 165, 13 Am. Rep. 120; *Clapp v. Stanton*, 20 La. Ann. 495; *Smith v. Pierce*, 1 La. 350. See also, *Vanderslice v. The Superior*, 4 Pa. L. J. Rep. 388, Fed. Cas. No. 16,843.

99. *White v. Tug Mary Ann*, 6 Cal. 462, 65 Am. Dec. 523; *Walston v. Myers*, 5 Jones L. (N. C.) 172; *Ashmore v. Pennsylvania, etc., Co.*, 28 N. J. L. 180.

This ruling is contrary to the general rule maintained in the United States courts, the courts of other states, and the English courts.¹

§ 19. Owners of boats employed in towing other boats or vessels.

The United States courts have held that an engagement to tow does not impose an obligation to insure or the liability of a common carrier, and that owners of a tug engaged in towing are not liable as carriers, but for reasonable care, caution, and maritime skill in the management of the tow. The contract requires no more than that he who undertakes to tow shall carry out his undertaking with that degree of caution and maritime skill which prudent navigators usually employ in similar services.² A towing

1. See § 19, *post*. In explanation of this conflict of authority, it was said by Howe, J., in *Bussey v. Mississippi Val. Transp. Co.*, *supra*: "Such conflict of authority might be very distressing to the student but for the fact that when these writers and cases cited by them are examined, the discrepancy, except in the decisions in *Brown v. Clegg*, 63 Pa. St. 51, 3 Am. Rep. 522, is more imaginary than real. There are two very different ways in which a steam tow-boat may be employed, and it is likely that Mr. Story (*Story on Bailments*, § 496) was contemplating one method, and Mr. Kent (2 Kent's Com. 599) the other. In the first place it may be employed as a mere means of locomotion under the entire control of the towed vessel; or the owner of the towed vessel and goods therein may remain in possession and control of the property thus transported to the exclusion of the bailee; or the towing may be casual merely, and not as a regular business between fixed termini. . . . And it might well be said that under such circumstances the tow boat or tug is

not a common carrier. But a second and quite different method of employing a tow boat is where she plies regularly between fixed termini, towing for hire and for all persons barges laden with goods, and taking into her full possession and control and out of the control of the bailor the property thus transported. Such is the case at bar. It seems to satisfy every requirement in the definition of a common carrier. . . . We must think that in all reason the liability of the defendants under such circumstances should be precisely the same as if, the barge being much smaller, it had been carried, cargo and all, on the deck of their tug."

2. *The Blue Bell*, 189 Fed. 824; *The E. V. McCaulley*, 189 Fed. 827; *The Harry M. Wall*, 187 Fed. 278; *Southern Towing Co. v. Egan*, 184 Fed. 275, 106 C. C. A. 417; *The Fort George*, 183 Fed. 731, 106 C. C. A. 417, 172 Fed. 1008; *The Leader*, 181 Fed. 743, *J. T. Morgan Lumber Co. v. West Kentucky Co.*, 811 Fed. 271; *The J. P. Donaldson*, 167 U. S. 603; *The Propeller Burlington*, 137 U. S. 386; *Munks v. Jackson* (C. C. App.

tug is not a "common carrier" nor an insurer, and is bound only to the exercise of reasonable skill and care taking into consideration the fact that it contracts as an expert and is bound to know the channel and its usual currents and dangers and to avoid obstructions which ought to be known to men experienced in its navigation.^{2a} Such is maintained to be the law in New York, where, in the leading case, the court said: "It is a great misnomer to call the defendant common carriers, or carriers of any kind in relation to the business of towing boats. Nor are they bailees of any description; for the property towed is not delivered to them, nor placed within their exclusive custody or control. It remains in the possession and for most purposes in the exclusive care of the owners or their servants. There is no bailment within any definition of that term to be found in the books. But whether a bailment or not, it is clear that those who tow boats and vessels are not common carriers of the things towed."³ That towing vessels or

9th C.), 13 C. C. A. 641, 66 Fed. 571; *The L. P. Dayton*, 120 U. S. 337; *Eastern Transportation Line v. Hope*, 95 U. S. (5 Otto) 297; *Hintner v. Steamer Napoleon*, 3 Wall. (U. S.) 5; *The Quickstep*, 9 Wall. (U. S.) 665; *The Steamer Webb*, 14 Wall. (U. S.) 406; *The Lyon*, 1 Brown's Adm. (U. S.) 59; *The Stranger*, 1 Brown's Adm. (U. S.) 281; *The Oconto*, 5 Biss. (U. S.) 460; *The Merrimac*, 2 Sawy. (U. S.) 586; *The Angelina Corning*, 1 Ben. (U. S.) 109; *The Princeton*, 3 Blatchf. (U. S.) 54; *The Neaffie*, 1 Abb. (U. S.) 465; *Brawley v. The Jim Watson*, 2 Bond (U. S.) 356; *The Margaret v. Bliss*, 94 U. S. 494; *The New Philadelphia*, 66 U. S. (1 Black) 62, 17 L. Ed. 84.

2a. *The El Rio*, 162 Fed. 567.

3. *Wells v. Steam Navigation Co.*, 2 N. Y. 294, 205, *Bronson, J.*; s. c. 8 N. Y. 375; *Arctic Fire Ins. Co. v. Austin*, 54 Barb. (N. Y.) 559; *Caton v. Rumney*, 13 Wend. (N. Y.) 387; *Alexander v. Greene*, 3 Hill (N. Y.),

9, revd. 7 Hill (N. Y.), 533; *Wooden v. Austin*, 51 Barb. (N. Y.) 9; *Abbey v. The Robert L. Stevens*, 22 How. Pr. (N. Y.) 78; *Parmalee v. Wilks*, 22 Barb. 539; *Merrick v. Brainard*, 38 Barb. 574; *Carpenter v. Eastern Transp. Line*, 67 Barb. 570.

Worth preserving.—The remarks of *Bronson, J.*, in his opinion above quoted, concerning the reversal of the decision in the case of *Alexander v. Greene*: "It is true that the judgment in *Alexander v. Greene* was reversed by the Court of Errors. (7 Hill, 583.) But what particular point or principle of law was decided by the court, or what a majority of the members thought upon any particular question of law, no one can tell. It appears by the reporter's head note, that he could not tell, and from his note at the end of the case, it is apparent that the court itself could not tell. Two merchants and two lawyers thought the defendants were common carriers, while other

boats are not common carriers as to the tow, but incur only the responsibility of ordinary bailees for hire, is maintained by many decisions of the courts of Pennsylvania and other states.⁴ The English courts hold the same doctrine.⁵ In Kentucky it has been held, contrary to the view taken by the Louisiana courts in reference to tow boats on the Mississippi River, that owners of tow boats on the Ohio River and its tributaries are merely private carriers, and are only liable to exercise ordinary care and skill, considering the nature of their business. Unless he has made a special agreement therefor, a private carrier is not bound to carry or tow for all persons tendering to him anything to be transferred or towed. Otherwise as to a common carrier, or one who has so acted as to justify the belief that he offers to carry for any person between certain termini, or on a certain route.⁶ The duty rests upon

senators expressed a different opinion, and went upon other grounds; and it does not appear that more than four of the seventeen senators who voted for the reversal were agreed concerning any one of the questions in the case. Two efforts were made at the time to ascertain "the ground of the judgment," but both proved abortive; and thus the majority virtually said, that although the judgment was reversed, no point or principle of law was settled by the decision. It happened in that case, as it has happened on other occasions, that a majority of the members of that multitudinous court made up their minds to reverse a judgment, and they did it; but not being able to agree concerning the ground of their action, they plainly enough admitted that nothing was settled by the decision. The case is not an authority for anything; it could only have been reported for the purpose of preserving the reasons of those who delivered opinions."

4. *Hayes v. Millar*, 77 Pa. St. 238,

18 Am. Rep. 445; *Brown v. Clegg*, 63 Pa. St. 51, 3 Am. Rep. 522; *Leonard v. Hendrickson*, 18 Pa. St. 40; *Hays v. Paul*, 51 Pa. St. 134, 88 Am. Dec. 569; *Sproul v. Hemingway*, 14 Pick. (Mass.) 1; *Pennsylvania Nav. Co. v. Dandridge*, 8 Gill & J. (Md.) 248, 29 Am. Dec. 543.

As to whether persons engaged in towing vessels are liable as common carriers, *quaere*, *Ashmore v. Pennsylvania, etc., Co.*, 28 N. J. L. (4 Dutch.) 180.

5. *Symonds v. Pain*, 6 Hurl. & N. 709; *The Julia*, 14 Moore P. C. 210; *The Minnehaha*, 1 Lush. 335.

6. *Varble v. Bigley*, 77 Ky. (14 Bush) 698; 9 Cent. L. J. 153, 29 Am. Rep. 435. See § 18, *ante*. In a later case it has been held that the question whether the owner of a tow boat held himself out as a common carrier for the time being was for the jury, and that if the jury found that he had, then he was liable as a common carrier. *Bassett & Stone v. Aberdeen Coal & Mining Co. (Ky.)*, 88 S. W. 318.

a towing tug to exercise at least reasonable skill and care in everything relating to the undertaking, having due regard to the extent of the voyage and any special hazards incident to the seas to be traversed, including not only proper and safe navigation of the tug on the voyage, but also to see to the proper make-up of the tow and the furnishing of safe, sound, and suitable appliances and instrumentalities for the service to be performed.^{6a} The duty of a tug to a tow is a continuous one from the time the service commences until it is completed, and where it becomes necessary to anchor the tow the tug's obligation of reasonable care continues, at least until she is safely anchored.^{6b} Where two tugs are acting jointly in towing a vessel, and an accident happens to the tow through their negligence, both tugs are liable, notwithstanding the fact that one is acting as a helper, under orders of the master of the other.^{6c}

§ 20. Ferrymen.

A ferry is a continuation of the highway from one side of the water over which it passes to the other, and is for the transportation of passengers, or of travelers with their teams and vehicles and such other property as they may carry or have with them.⁷ In a strictly ferry business, property is always transported only with the owner or custodian thereof; and ferrymen who do nothing but a ferry business, and have nothing but a ferry franchise, are bound to transport no other property; and in the transportation of persons with their property, they are not under the obligations of a common carrier, but are bound only to use due care and diligence. It is well settled that if the owner retains control of the property himself, and does not surrender the charge of it to the ferryman, he is not a common carrier and liable as such for all losses and injuries except those caused by the act of God or the public enemies, but is only responsible for actual negligence.⁸

6a. *The Britannia*, 148 Fed. 495;
The Edwin Terry, 162 Fed. 309, 311,
 89 C. C. A. 17, 19.

6b. *The Printer*, 164 Fed. 314.

6c. *The Anthracite*, 162 Fed. 384.

7. *Broodnox v. Baker*, 94 N. C.
 675.

8. *Wyckoff v. Queens County Ferry*

Co., 52 N. Y. 35, 11 Am. Rep. 650;
Evans v. Rudy, 34 Ark. 385; *Harvey*
v. Rose, 26 Ark. 3, 7 Am. Rep. 595;
Davies v. Mann, 10 Mees. & W.
 (Eng.) 546; *Dudley v. Camden &*
Phila. Ferry Co., 13 Vroom. (N. J.)
 25; *White v. Winnisimmet Co.*, 7
Cush. (Mass.) 155.

But ferrymen may combine, and usually do combine, with the ferry business, the business of a common carrier, carrying freight and merchandise without the presence of the owner or custodian, like other carriers engaged in the transportation of such freight; and as to such freight, they are under the duties and obligation of a common carrier. As ferrymen, they are under a public duty to transport with suitable care and diligence all persons with or without their vehicles and other property; and as common carriers, it is their duty to carry all freight and merchandise delivered to them.⁹ It is maintained by many authorities and seems to be well settled that ferrymen, when they receive property for transportation, and have the exclusive custody of it, are to be held to the strict liability of common carriers.¹⁰ It is held that public ferrymen are presumably responsible, as common carriers, for property received by them for transportation; that to relieve themselves, they must show that they had no such control over it as invested them with the character of a common carrier; that after the property has been put on board their boats, it is *prima facie* in their charge, and they are responsible for it; and it makes no difference that the owner is present, unless he consent to assume the charge thereof.¹¹ Other cases hold that ferrymen are chargeable as com-

9. Mayor, etc., of New York v. Starin, 106 N. Y. 1.

10. Wyckoff v. Queens County Ferry Co., 52 N. Y. 35, 11 Am. Rep. 650, the liability of a common carrier in all its extent only attaches when there is an actual bailment and the party sought to be charged has the exclusive custody and control of property for carriage; Clark v. Union Ferry Co., 35 N. Y. 485; Evans v. Rudy, 34 Ark. 385; Harvey v. Rose, 26 Ark. 3; Pomeroy v. Donaldson, 5 Mo. 36; Babcock v. Herbert, 3 Ala. 392; Sanders v. Young, 1 Head (Tenn.), 219; May v. Hanson, 5 Cal. 360; Smith v. Seward, 3 Pa. St. 342; Albright v. Penn, 14 Tex. 290; Sohen v. Hume, 1 McCord (S. C.), 444; Miles v. James, 1 McCord (S.

C.), 157; White v. Winnisimmet Co., 7 Cush. (Mass.) 155; Joy v. Winnisimmet Co., 114 Mass. 63; Miller v. Pendleton, 8 Gray (Mass.), 574; Claypool v. McAllister, 29 Ill. 504; Garner v. Green, 8 Ala. 96; Trent v. Cartersville Bridge Co., 11 Leigh (Va.), 544; Walker v. Jackson, 10 M. & W. 161; Rutherford v. McGowen, 1 Nott & M. (S. C.) 19; Wiloughby v. Horridge, 12 C. B. 742.

11. Harvey v. Ross, 26 Ark. 3; Powell v. Mills, 37 Miss. 691; Slimmer v. Merry, 23 Iowa, 91; Whitmore v. Bowman, 4 G. Gr. (Iowa) 148; LeBarron v. East Boston Ferry Co., 11 Allen (Mass.), 312; Richards v. Fuqua, 28 Miss. 793; Griffith v. Cave, 22 Cal. 535.

mon carriers for the absolute safety of property thus carried, and that the owner, in taking care of the property during the passage of the boat, may be regarded as the agent of the ferryman;¹² but this position is questioned as not based upon any just principle and as not within the reasons of public policy upon which the extreme liabilities of common carriers rest.¹³ One who keeps a ferry for his own use and for the convenience of customers to his mill, but who charges no ferriage, is not a common carrier, and is only bound to ordinary diligence.¹⁴ But the owner of a private ferry, although not on a road opened by public authority, or repaired by public labor, may so use it as to subject himself to the liability of a common carrier, if he undertakes for hire, to convey across the river all persons indifferently, with their carriage and goods; but this is a question for a jury.¹⁵ A corporation incorporated under Mich. Comp. Laws, §§ 6646-6659, to own and operate ferries on a river, which owns and operates an amusement park and steamers for the transportation of persons to and from the park, is not a common carrier while engaged in transporting such persons, and may refuse transportation to any one at its pleasure.^{15a}

§ 21. Hackmen.

Proprietors of hacks have been held to be common carriers and bound to exercise the utmost care and skill.¹⁶ But whether the hackman's business can be justly considered that of a common carrier under all circumstances has been questioned. It is said

12. *Fisher v. Clisbee*, 12 Ill. 344; *Powell v. Mills*, 37 Miss. 691; *Wilson v. Hamilton*, 4 Ohio St. 722.

13. *Wyckoff v. Queens County Ferry Co.*, *supra*.

14. *Self v. Dunn*, 42 Ga. 528, 5 Am. Rep. 544.

15. *Littlejohn v. Jones*, 2 McMul. (S. C.) 366, 39 Am. Dec. 132.

15a. *Meisner v. Detroit, etc., Ferry Co.*, 154 Mich. 545, 15 Det. Leg. N. 826, 118 N. W. 14.

16. *Bonce v. Dubuque St. Ry. Co.*, 53 Iowa, 278, 36 Am. Rep. 221.

17. *Brown v. N. Y. Cent. & H. R.*

Co., 75 Hun (N. Y.), 355, 56 St. Rep. (N. Y.) 748, 27 N. Y. Supp. 69. The point actually decided in the case last cited was that a hackman is not a common carrier within the meaning of N. Y. Laws 1892, chap. 676, providing that no preference for the transaction of the business of a common carrier upon its cars, or in its depots or buildings, or upon its grounds, shall be granted by any railroad company to any one of two or more persons competing in the same business, or in that of transporting for themselves or others.

that he transports passengers here and there about the streets of a village or city, having no established route over which his conveyance runs, nor any specified times for making his trips. He assumes the right to let his rig for a day, or any other specified time, to suit the convenience or wishes of his patrons. He gives the exclusive use of his carriage to a less number of persons than it can conveniently accommodate. He pursues his business if he finds it profitable to do so; if not, he remains idle. The obligations and duties of a common carrier are very different.¹⁷ Where a passenger riding in a hired cab was injured in a collision between the cab and a street car by the concurrent negligence of the street car company and the cab driver, the cab driver was a common carrier of passengers for hire, and an instruction that he was bound to exercise a very high degree of care was proper.^{17a} The duty of a hack driver requires no greater degree of care than that he keep a prudent and careful lookout ahead of him, and that he use all reasonable care to avoid obstructions and excavations in the street.^{17b} One who solicits the services of a licensed hackman is a passenger, within the meaning of an ordinance providing that it shall be unlawful for the driver of an omnibus or automobile to refuse to convey a passenger from any one point to any other point in the city.^{17c}

§ 22. Proprietors of omnibuses.

The proprietor of a line of omnibuses and baggage wagons, engaged in the business of carrying, for hire, passengers and baggage, or either alone, between the hotels and depots of a city, is a common carrier; and is answerable as such for the safe delivery of articles received for transportation.¹⁸ Omnibus proprietors who carry passengers and baggage for hire incur the ordinary responsibility of a common carrier, with respect to their baggage; nothing will excuse them for a loss of, or injury to it, but inevitable accident, or the act of the public enemy.¹⁹ A carrier of passengers is

17a. *Stiner v. Metropolitan St. Ry. Co.*, 84 N. Y. Supp. 285.

17b. *Fisher v. Tryon*, 15 Ohio Cir. Ct. Rep. 541, 8 O. C. D. 556.

17c. *Atlantic City v. Brown*, 71 N. J. Law, 81, 58 Atl. 110.

18. *Parmelee v. Lowitz*, 74 Ill. 116, 24 Am. Rep. 276.

19. *Powell v. Myers*, 26 Wend. (N. Y.) 591; *Camden & Amboy R. Co. v. Belknap*, 21 Wend. (N. Y.) 354; *Clark v. Faxton*, 26 Wend. (N. Y.)

responsible for their baggage, if lost, though no distinct price be paid for its transportation; but he is not liable for a large sum of money, in a trunk, in excess of an amount ordinarily carried for traveling purposes.²⁰

§ 23. Proprietors of stage coaches.

Stage coach proprietors are answerable as common carriers for the baggage of passengers, and cannot restrict their liability by a general notice that "the baggage of passengers is at the risk of the owners."²¹ An established practice of conveying for hire, in a stage coach, parcels not belonging to passengers, constitutes the proprietors of the coach common carriers, and renders them liable for the loss or injury of such parcels.²² The driver of a stage coach, in the general employ of the proprietors of the coach, and in the habit of transporting small packages of money for a small compensation, which was uniform, whatever might be the amount of the package, is a bailee for hire, answerable for ordinary negligence, and not subject to the responsibilities of a common carrier.²³

153; *Cole v. Goodwin*, 19 Wend. (N. Y.) 251; *Hollister v. Nowlen*, 19 Wend. (N. Y.) 234; *Camden & Amboy R. Co. v. Burke*, 13 Wend. (N. Y.) 611; *Dibble v. Brown*, 12 Ga. 217, 56 Am. Dec. 460; *Jones v. Voorhees*, 10 Ohio, 145.

20. *Orange Co. Bank v. Brown*, 9 Wend. (N. Y.) 85; *Hawkins v. Hoffman*, 6 Hill (N. Y.), 586; *Hollister v. Nowlen*, 19 Wend. (N. Y.) 234; *Cole v. Goodwin*, 19 Wend. (N. Y.) 251; *McGill v. Rowand*, 3 Barr (Pa.), 451; *Bomer v. Maxwell*, 9 Humph. (Tenn.) 621; *Brooke v. Pickwick*, 4 Bing. (Eng.) 218.

21. *Hollister v. Nowlen*, 19 Wend. (N. Y.) 234; *Cole v. Goodwin*, 19 Wend. (N. Y.) 251; *Clark v. Faxton*, 21 Wend. (N. Y.) 153; *Powell v. Myers*, 26 Wend. (N. Y.) 591; *Camden & Amboy R. Co. v. Belknap*, 21 Wend. (N. Y.) 354; *Jones v. Voorhees*, 10 Ohio, 145.

22. *Dwight v. Brewster*, 1 Pick. (Mass.) 53, 11 Am. Dec. 133; *Beckman v. Shouse*, 5 Rawle (Pa.), 179, 23 Am. Dec. 653; *Robertson v. Kennedy*, 2 Dana (Ky.), 430; *Merwin v. Butler*, 17 Conn. 138; *McHenry v. Philadelphia, etc., Co.*, 4 Har. (Del.) 448; *Jones v. Voorhees*, 10 Ohio, 145; *Powell v. Mills*, 30 Miss. 231, 64 Am. Dec. 158, *prima facie*, the proprietors of stage coaches, used for carrying the mails, passengers and their baggage, are not to be considered common carriers as to articles not strictly within their line of business, in the technical sense of that term. They may, however, make themselves such by special contract, in a particular case, or by their general course of business. *Peizotti v. McLaughlin*, 1 Strob. (S. C.) 468, 47 Am. Dec. 563; *Walker v. Skipwith*, Meigs (Tenn.), 502.

23. *Sheldon v. Robinson*, 7. N. H. 157.

The owners of the coach in such a case were held answerable for the negligence of the driver in not delivering a parcel of that description, intrusted to him to carry, unless the arrangement was known to the owner of the goods, so that he contracted with the driver as principal.²⁴ The responsibility of a carrier does not attach, until there has been a complete delivery for transportation, to him, or to a servant instructed to receive goods for such purpose.²⁵ The driver of a stage coach should, before commencing his journey, ascertain that the passengers are seated; but in his journey over ordinary streets and highways, where frequent or occasional necessary stoppages are made because of crowds, parades, or the like, or because of the use of the street or highway by others of the public, he is not bound, before he starts again, to give notice to the passengers that he is about to do so, or to ascertain whether the passengers remained seated as before the stoppage was made.^{25a} In an action against a stagecoach proprietor for injuries to one while a passenger, it was error to refuse to instruct that, unless the negligent act complained of was the direct and proximate cause of the runaway which resulted in the injury, plaintiff could not recover.^{25b}

§ 24. Palace and sleeping car companies.

Sleeping car companies are not insurers of the baggage, money, or other personal effects of a passenger, and the courts have almost universally refused to impose upon them the absolute liability attaching to innkeepers and common carriers of goods.²⁶ While

24. *Bean v. Sturtevant*, 8 N. H. 146; *Dwight v. Brewster*, 1 Pick. (Mass.) 53; *Beckman v. Shouse*, 5 Rawle (Pa.), 179.

25. *Blanchard v. Isaacs*, 3 Barb. (N. Y.) 388.

25a. *Haile v. Clayton & Hoff Co.*, 61 N. J. Law, 197, 38 Atl. 805.

25b. *Taillon v. Mears*, 29 Mont. 161, 74 Pac. 421.

26. *N. Y.—Williams v. Webb*, 27 Misc. Rep. (N. Y.) 508, 58 N. Y. Supp. 300, 6 Am. Neg. Rep. 129, modg. 22 Misc. Rep. (N. Y.) 513, 49

N. Y. Supp. 1111; *Carpenter v. New York, etc., R. Co.*, 124 N. Y. 53, 26 N. E. 277, 21 Am. St. Rep. 644, 47 Am. & Eng. R. Cas. 421; *Tracy v. Pullman Palace Car Co.*, 67 How. Pr. (N. Y.) 154; *Welch v. Pullman Palace Car Co.*, 16 Abb. Pr. N. S. (N. Y.) 352; *Palmeter v. Wagner*, 11 Alb. L. J. 149.

U. S.—Barrott v. Pullman Palace Car Co., 51 Fed. 796; *Lemon v. Pullman Palace Car Co.*, 52 Fed. 262; *Blum v. Southern Pullman Palace Car Co.*, 1 Flip. (U. S.) 500.

the law, however, does not make a sleeping car company the insurer of the effects of the occupants of its berths, it does not absolve it from all liability. But the ground of this liability rests simply and solely in negligence. The company is bound to exercise reasonable care and vigilance in looking after the person and property of a passenger during the night while the passenger is asleep, or using the necessary conveniences of the car, and it is bound so to manage its car as not unreasonably to expose his property to an unusual risk of loss by thieves or otherwise, and it is liable only for its failure so to do.²⁷ A contrary doctrine has been enunciated

Ala.—Pullman Palace Car Co. v. Adams (Ala.), 24 So. 921.

Ill.—Pullman Palace Car Co. v. Smith, 73 Ill. 360, 24 Am. Rep. 258.

Ind.—Woodruff Sleeping, etc., Coach Co. v. Diehl, 84 Ind. 474, 9 Am. & Eng. R. Cas. 294, 43 Am. Rep. 102.

Ky.—Pullman Palace Car Co. v. Gaylord, 6 Ky. L. Rep. 279, 23 Am. L. Reg. (N. S.) 788.

La.—Williams v. Pullman Palace Car Co., 40 La. Ann. 87, 33 Am. & Eng. R. Cas. 407, 8 Am. St. Rep. 512.

Mass.—Lewis v. New York Sleeping Car Co., 143 Mass. 269, 28 Am. & Eng. R. Cas. 148, 58 Am. Rep. 145; Dawley v. Wagner Palace Car Co., 169 Mass. 315.

Miss.—Illinois Cent. R. Co. v. Handy, 63 Miss. 609, 56 Am. Rep. 846; Pullman Palace Car Co. v. Lawrence, 74 Miss. 784, 22 So. 53.

Mo.—Morrow v. Pullman Palace Car Co., 98 Mo. App. 351, 73 S. W. 281; Bevis v. Baltimore, etc., R. Co., 26 Mo. App. 19; Scaling v. Pullman Palace Car Co., 24 Mo. App. 29; Root v. New York Cent. Sleeping Car Co., 28 Mo. App. 199; Hampton v. Pullman Palace Car Co., 42 Mo. App. 134.

Ohio.—Falls River & M. Co. v. Pull-

man Palace Car Co., 4 Ohio N. P. 26, 6 Ohio Dec. 85.

Pa.—Pullman Palace Car Co. v. Gardner, 3 Penny. (Pa.) 78, 16 Am. & Eng. R. Cas. 324.

Tenn.—Pullman Palace Car Co. v. Gavin, 93 Tenn. 53, 23 S. W. 70, 21 L. R. A. 298, 42 Am. St. Rep. 902.

Tex.—Pullman Palace Car Co. v. Matthews, 74 Tex. 654, 15 Am. St. Rep. 873; Pullman Palace Car Co. v. Pollock, 69 Tex. 120, 34 Am. & Eng. R. Cas. 217, 5 Am. St. Rep. 31; Belden v. Pullman Palace Car Co. (Tex. Civ. App.), 43 S. W. 22, 3 Am. Neg. Rep. 746.

Can.—Smith v. Pullman Palace Car Co. (Can.), 60 Alb. L. J. 188.

27. Williams v. Webb, *supra*; Pullman's Palace Car Co. v. Hall, 106 Ga. 765, 71 Am. St. Rep. 293, 32 S. E. 923; Voss v. Wagner Palace Car Co., 16 Ind. App. 271, 43 N. E. 20; Stevenson v. Pullman Palace Car Co. (Tex. Civ. App.), 26 S. W. 112, 32 S. W. 335; Chamberlain v. Pullman Palace Car Co., 55 Mo. App. 474; Henderson v. Louisville & N. R. Co., 20 Fed. 437; Pullman Palace Car Co. v. Hunter (Ky.), 54 S. W. 845, 47 L. R. A. 286; Pullman Palace Car Co. v. Hatch (Tex. Civ. App.), 70 S.

ated in one or two cases.²⁸ It has been held that a passenger is entitled to recover from a sleeping car company for the loss or theft, through the negligence of the car employes, of such articles in a valise as are usually carried by hand, which add to the comfort, pleasure, and enjoyment of the traveler, and they may include an opera glass and compass, but not a pistol;²⁹ for the theft of a diamond ring although placed in a pocket book;³⁰ for rings stolen from her fingers while she slept;³¹ for such sum of money only as is reasonably necessary to defray the expenses of his trip, taking into consideration his station in life, the length, duration, and purposes of his journey, as well as emergencies that may probably arise.³² The mere proof of loss of money or personal

W. 771; *Pullman Palace Car Co. v. Adams*, 120 Ala. 581; *Pullman Palace Car Co. v. Arents* (Tex. Civ. App.), 66 S. W. 329; *Dawley v. Wagner Palace Car Co.*, 169 Mass. 315, 47 N. E. 1024; *Hughes v. Pullman Palace Car Co.*, 74 Fed. 499, it is bound to the exercise of ordinary and reasonable care over the passengers and their effects, whether the contract involved in the ticket sold by it prescribes it in terms or not. See also, cases cited in last preceding note.

The question of the company's negligence is a question for the jury. *Arthur v. Pullman Co.*, 44 Misc. Rep. (N. Y.) 229, 88 N. Y. Supp. 981; *Hatch v. Pullman Sleeping Car Co.* (Tex. Civ. App.), 84 S. W. 246.

28. *Pullman Palace Car Co. v. Lowe*, 28 Neb. 239, 40 Am. & Eng. R. Cas. 637, 26 Am. St. Rep. 325, holding the liability of a sleeping car company in the case of articles of wearing apparel lost in the car to be similar to the innkeeper's liability; *Nashville, etc., R. Co. v. Lillie* (Tenn.), 78 S. W. 1055, where a passenger carried a valise into a sleeping car and on retiring placed it under his berth, the valise was, in effect,

placed in charge of the railroad company, and hence it was liable as an insurer thereof; *Voss v. Wagner Palace Car Co.*, 16 Ind. App. 271, 43 N. E. 20, a sleeping car company becomes responsible as a common carrier for the safe delivery of the baggage of a passenger intrusted to the porter to be carried to a given place.

29. *Cooney v. Pullman Palace Car Co.*, 121 Ala. 368, 25 So. 713, 6 Am. Neg. Rep. 1. See also, *Blum v. Southern Pullman Palace Car Co.*, 1 Flip. (U. S.) 500; *Hampton v. Pullman Palace Car Co.*, 42 Mo. App. 134.

30. *Pullman Palace Car Co. v. Adams*, 120 Ala. 581, 24 So. 921, 45 L. R. A. 767, but not where it was not in a condition to be worn for the use, convenience, or ornament of the passenger on his trip.

31. *Pullman Palace Car Co. v. Hunter* (Ky.), 54 S. W. 845, 47 L. R. A. 286.

32. *Williams v. Webb*, 27 Misc. Rep. (N. Y.) 508, 58 N. Y. Supp. 300, 6 Am. Neg. Rep. 129; *Barrott v. Pullman Palace Car Co.*, 51 Fed. 796; *Hills v. Chicago, etc., R. Co.*, 72 Iowa, 228; *Pfaelzer v. Palace Car Co.*, 4 W. N. C. (Pa.) 240. It does not extend

effects by a passenger while occupying a berth in a sleeping car does not make out a *prima facie* case against the company, but some evidence of negligence on the part of the defendant must be given.³³ Neither the railroad company nor the sleeping car company is liable for a loss of baggage when the passenger himself was negligent.³⁴ A sleeping car company will not be liable for sickness contracted by an occupant of an upper berth from water dripping from an open ventilating window during a heavy rain storm in the night, where he did not notify those in charge of the train that he needed special care, or request those in charge of the car to close the ventilator and was in a position to reach and close it himself at any time.³⁵ A sleeping car company is bound to furnish the required accommodations to a passenger if it has them;³⁶ but not to one who by the rules of the company is not entitled to use these accommodations, as, for example, one not holding a through ticket or a second class passenger.³⁷ The company is liable in damages

to an amount which he is carrying for the purpose of depositing in a bank. *Williams v. Webb*, 22 Misc. Rep. (N. Y.) 513, 49 N. Y. Supp. 1111.

33. *Carpenter v. New York, etc.*, R. Co., 124 N. Y. 53; *Tracy v. Pullman Palace Car Co.*, 67 How. Pr. (N. Y.) 154; *McMurray v. Pullman's Palace Car Co.*, 86 Mo. App. 619; *Hills v. Chicago, etc.*, R. Co., 72 Iowa, 228; *Root v. New York Cent. Sleeping Car Co.*, 28 Mo. App. 199; *Pullman Palace Car Co. v. Pollock*, 69 Tex. 120; *Stearns v. Pullman Car Co.*, 8 Ont. Rep. 171. Compare *Pullman Palace Car Co. v. Lowe*, 28 Neb. 239; *Railroad Co. v. Walrath*, 38 Ohio St. 461. The company cannot avoid liability for property lost or stolen through its negligence, by posting in the car a notice disclaiming responsibility, if it does not appear that the passenger saw the notice. *Lewis v. New York Cent. Sleeping Car Co.*, 143 Mass. 267.

34. *Welch v. Pullman Palace Car Co.*, 16 Abb. Pr. N. S. (N. Y.) 352; *Whicher v. Boston, etc.*, R. Co., 176 Mass. 275, 57 N. E. 801; *Whitney v. Pullman Palace Car Co.*, 143 Mass. 243; *Hills v. Chicago, etc.*, R. Co., 72 Iowa, 228; *Barrott v. Pullman's Palace Car Co.*, 51 Fed. 796; *Root v. New York Cent. Sleeping Car Co.*, 28 Mo. App. 199; *Illinois Cent. R. Co. v. Handy*, 63 Miss. 609; *Pullman Palace Car Co. v. Matthews*, 74 Tex. 654.

35. *Edmunson v. Pullman Palace Car Co.*, 92 Fed. 824, 14 Am. & Eng. R. Cas. N. S. 336.

36. *Searles v. Mann Boudoir Car Co.*, 45 Fed. 339; *Nevin v. Pullman Palace Car Co.*, 106 Ill. 222, 11 Am. & Eng. R. Cas. 92, 46 Am. Rep. 688.

37. *Lemon v. Pullman Palace Car Co.*, 52 Fed. 262; *Pullman Palace Car Co. v. Taylor*, 65 Ind. 153, 32 Am. Rep. 57; *Lawrence v. Pullman Palace Car Co.*, 144 Mass. 1, 28 Am. & Eng. R. Cas. 151, 59 Am. Rep. 58. A

for breach of contract to reserve a berth for a passenger or for failure to furnish him with a berth in accordance with a ticket purchased and paid for by him.³⁸ The company is bound, and it is its right, to preserve order and enforce a proper decorum, as well as to keep a reasonable watch over the persons and property of passengers.³⁹ The business of running drawing room, or palace or sleeping cars in connection with ordinary passenger cars has become one of the common incidents of passenger traffic on the leading railroads of the country. These cars are mingled with the other cars of the company, and are open to all who desire to enter them, and who are willing to pay a sum in addition to the ordinary fare, for the special accommodation afforded by them. They are

sleeping car company is not liable for the refusal of its conductor to permit a passenger's son to occupy a section with his parents without payment therefor, where the son was not named in the pass with them, and a rule of the company required payment from any one not so named. *Pullman Palace Car Co. v. Marsh (Ind.)*, 53 N. E. 782, 1 Repr. 1024.

Ejection of passenger. A sleeping car company is not a common carrier of passengers, and its liability to persons seeking its accommodations rests solely on breach of its implied obligation to furnish such accommodations as it holds itself out as offering to the public. *Calhoun v. Pullman Palace Car Co.*, 149 Fed. 546 (C. C., Tenn. 1906).

38. *Pullman Palace Car Co. v. Cain*, 15 Tex. Civ. App. 503, 40 S. W. 220; *Pullman Palace Car Co. v. Nelson*, 22 Tex. Civ. App. 223, 54 S. W. 624, for breach of contract to reserve a berth for a passenger who boarded a sleeping car, suffering from illness, and in consequence, owing to the negligence of the sleeping car company, was compelled to sleep in the waiting

room, where her privacy was frequently intruded on by the porter and others, and she was kept awake, resulting in great physical pain, mental distress and humiliation during the entire night, a judgment of \$900 is not excessive.

Plaintiff bought and paid for a sleeping car ticket several hours before the train left. At the time of starting he was received as a guest on the train and assigned to his section, but was afterwards told by the conductor that he could not have the berth, because it was occupied by someone else, and plaintiff was compelled to sit all night in an ordinary day coach. On his application for redress, he was told that he could have his money back. Held, that the evidence sustained a verdict for plaintiff. *Braun v. Webb*, 65 N. Y. Supp. 668, 32 Misc. Rep. (N. Y.) 243, affg. on rehearing 62 N. Y. Supp. 1037.

39. *Nevin v. Pullman Palace Car Co.*, 106 Ill. 222; *Lewis v. New York Sleeping Car Co.*, 143 Mass. 267; *Pullman Palace Car Co. v. Balles*, 80 Tex. 211, 47 Am. & Eng. R. Cas. 416.

owned in most instances, though not always, by corporations other than those operating the trains, such corporations making a business of the ownership and management of such cars. But they form a part of the train and are put on presumably in the interest of the railroad company, and the railroad company, as a rule, cannot relieve itself of its obligations and liabilities as a common carrier of passengers to those who make use of the accommodations afforded by such sleeping and palace or drawing room cars. In all matters relating to the safety of the passengers the conductor, porter, and other servants of such cars are the servants of the company of whose train the cars is for the time being a part.⁴⁰ A passenger may assume, in the absence of notice to the contrary, that the whole train is under one management.⁴¹ Allowing a valise to stand in the aisle of a dimly-lighted sleeping car, where passengers are apt to stumble over it, is negligence.⁴² But an experienced traveler who opens a vestibule door of a sleeping car by mistake, in the early morning, while the train is passing through a tunnel and the car is dark, and steps off upon the track, when he supposes he is entering the car closet, is guilty of such negligence as will preclude his recovery, even if the carrier is deemed negligent.⁴³ It is the duty of a carrier toward a passenger

40. *Dwinelle v. New York Cent., etc., R. Co.*, 120 N. Y. 117, 44 Am. & Eng. R. Cas. 384; *Thorpe v. New York Cent., etc., R. Co.*, 76 N. Y. 402, 32 Am. Rep. 325; *Pennsylvania R. Co. v. Roy*, 102 U. S. 451, 1 Am. & Eng. R. Cas. 225; *Evansville, etc., R. Co. v. Athon*, 2 Ind. App. 295, 33 N. E. 469; *Williams v. Pullman Palace Car Co.*, 40 La. Ann. 417, 4 So. 85; *Kinsley v. Lake Shore, etc., R. Co.*, 125 Mass. 54, 28 Am. Rep. 200; *Wilson v. Baltimore, etc., R. Co.*, 32 Mo. App. 682; *Bevis v. Baltimore, etc., R. Co.*, 26 Mo. App. 19; *Hillis v. Chicago, etc., R. Co.*, 72 Iowa, 228; *Louisville & N. R. Co. v. Ray*, 101 Tenn. 1, 46 S. W. 554, 11 Am. & Eng. R. Cas. N. S. 174.

41. *Ulrich v. New York Cent., etc.,*

R. Co., 198 N. Y. 80, 2 Am. St. Rep. 369, 34 Am. & Eng. R. Cas. 350; *Thorpe v. New York Cent., etc., R. Co.*, 76 N. Y. 402; *Cleveland, etc., R. Co. v. Walrath*, 38 Ohio St. 461; *Williams v. Pullman Palace Car Co.*, 40 La. Ann. 87, 417. See *Paddock v. Atchison, etc., R. Co.*, 37 Fed. 841.

42. *Levien v. Webb*, 30 Misc. Rep. (N. Y.) 196, 61 N. Y. Supp. 1113. See *Lycett v. Manhattan Ry. Co.*, 12 App. Div. (N. Y.) 326, 42 N. Y. Supp. 431.

43. *Piper v. New York Cent., etc., R. Co.*, 156 N. Y. 224, 41 L. R. A. 744, 50 N. E. 851, 11 Am. & Eng. R. Cas. N. S. 202, revg. 89 Hun (N. Y.), 75. A passenger on a sleeping car is not, as a matter of law, guilty of negligence in attempting to reverse her

holding a ticket to one point and a sleeping car ticket to another at which she must change cars in order to reach her destination, to awake her in time to make the necessary preparation for the change in a suitable and decent manner upon reaching the station, or, failing to do so, to hold the train for a sufficient time to enable her to make such preparation as is necessary to change cars without trepidation or the exposure of her person to the gaze of spectators, whether or not such duty is stipulated in the contract of carriage.⁴⁴ As the conductor of a train has control of a car of the Pullman Palace Car Company attached to the train, the railroad company cannot recover over against the other company for damages to a passenger on the palace car from mental suffering caused by the language of drunken persons permitted to enter and remain in the car.⁴⁵ A carrier of passengers is not an insurer of the quality of canned goods furnished on its dining cars, and is not liable for injuries to a passenger eating canned goods bought from a reliable dealer and guaranteed under the Pure Food Law, and containing no defect discoverable by the eye, smell, or taste.^{45a} A sleeping car company is not a common carrier unless so declared by constitutional or statutory provision.^{45b} Under the Interstate Commerce Act, section 1, as amended by the Hepburn Act June 29, 1906, the term "common carrier" as used in that act includes sleeping car companies.^{45c}

§ 25. Pipe line for carrying oil.

Under section 1 of the Interstate Commerce Act, as amended by the act June 29, 1906, pipe lines for the transportation of oil or other commodity, except water and except natural and artificial

position in her berth while the car is in rapid motion. *Smith v. Canadian Pac. R. Co. (Can.)*, 34 N. S. 22.

44. *McKeon v. Chicago, etc., R. Co.*, 64 Wis. 477, 35 L. R. A. 252, 69 N. W. 175, 2 Chic. L. J. Wkly. 175. Duty to awaken passenger in time to leave train: *Texas, etc., R. Co. v. Alexander (Tex. Civ. App.)*, 30 S. W. 1113; *Nichols v. Chicago, etc., R. Co.*, 90 Mich. 204; *Nunn v. Georgia R. Co.*, 71 Ga. 710; *Sevier v. Vicks-*

burg, etc., R. Co., 61 Miss. 8, 48 Am. Rep. 74; *Airey v. Pullman Palace Car Co.*, 50 La. Ann. 648, 23 So. 512.

45. *Houston, etc., R. Co. v. Perkins*, 21 Tex. Civ. App. 508, 52 S. W. 124.

45a. *Bigelow v. Maine Central R. Co.*, — Me. —, 85 Atl. 396.

45b. *Pullman Co. v. Linke*, 203 Fed. 1017.

45c. Interstate Commerce Act, § 1.

gas, are made common carriers within the meaning and purposes of that act. Statutes recently enacted in Kansas and Texas declare a pipe line to be a common carrier. The power of the State to make every pipe line a common carrier if it engages in the transportation of oil for persons other than the owner may be questioned. The right of the state to do so will, doubtless, be asserted upon the strength of those authorities which establish the power of the State to regulate the business of grain elevators and warehouses,⁴⁶ and hold them subject to statutory legislation requiring them to receive and store grain of other persons offered at lawful prices, when there is room for it,⁴⁷ and authorities sustaining the power of the State to declare a telegraph company a common carrier,⁴⁸ which are in many respects analagous cases. The fact that private pipe lines may be laid across, or in some instances along, public highways, with the consent of the local authorities, or along the right of way of interstate railroads, with the consent of the railroad companies, does not impress upon them any obligation to become common carriers.^{48a} That pipe line companies building interstate lines on private rights of way were incorporated as common carriers under the laws of the states where organized does not make them such in other states, nor prevent them from selling their lines in such states, with the right in the purchaser to use them exclusively in its private business.^{48b}

§ 26. Wagoners.

It has been held that a wagoner who, upon his own request, carries goods for hire, is a common carrier, whether the transportation be his principal and direct business, or an occasional and incidental employment, even where the principal business of the wagoner is that of a farmer.⁴⁹ But the weight of authority

46. *Budd v. New York*, 143 U. S. 517, 36 L. Ed. 247, 45 Alb. L. J. 354, 36 Am. & Eng. Corp. Cas. 31, 12 Sup. Ct. Rep. 468, 5 Am. Ry. & Corp. Rep. 610, 4 Inters. Com. Rep. 45; *Munn v. Illinois*, 94 U. S. 113.

47. *Brass v. North Dakota*, 153 U. S. 391, 38 L. Ed. 757, 14 Sup. Ct. Rep. 857, 4 Inters. Com. Rep. 670.

48. *Kirby v. Western Union Tel. Co.*, 7 S. D. 623, 65 N. W. 37, 30 L. R. A. 621.

48a. *Prairie Oil & Gas Co. v. United States* (U. S. Com. Ct.), 204 Fed. 798.

48b. *Prairie Oil & Gas Co. v. United States*, *supra*.

49. *Gordon v. Hutchinson*, 1 W.

seems to favor the contrary position, that an occasional undertaking to carry goods will not make a person a common carrier, but that the business must be habitual, not casual.⁵⁰ Where the undertaking to carry is an unauthorized act of the driver or agent of the owner of the wagon, the carrier is not liable.⁵¹

§ 27. Carriers by river craft.

A person who undertakes, though only as a casual employment *pro hac vice*, to carry by river, for hire, without special contract, incurs the responsibility of a common carrier.⁵² This rule has

and S. (Pa.) 285, 37 Am. Dec. 464; *Moses v. Norris*, 4 N. H. 304; *Moses v. Boston, etc., R. Co.*, 24 N. H. 71, 55 Am. Dec. 222; *Powers v. Davenport*, 7 Blackf. (Ind.) 497, 43 Am. Dec. 100; *Chevalier v. Straham*, 2 Tex. 115, 47 Am. Dec. 639, wherein the court said that there were no grounds in reason why the occasional carrier, who periodically, in every recurring year, abandons his other pursuits and assumes that of transporting goods for the public, should be exempted from any of the risks incurred by those who make the carrying business their constant or principal occupation.

50. *Fish v. Chapman*, 2 Ga. 353, 46 Am. Dec. 393, approved in *Nugent v. Smith*, 1 C. P. Div. 27, the leading authority sustaining this view, was a case where a farmer had never held himself out as a carrier generally, but was employed by the plaintiff to carry goods which, in crossing a stream upon the way, were injured by the upsetting of the wagon. The court, referring to the case of *Gordon v. Hutchinson*, 1 W. & S. (Pa.) 285, 37 Am. Dec. 464, says: "This decision no doubt contemplates an undertaking to carry generally without a special contract, and does not deny

to the undertaker the right to define his liability. There are cases in Tennessee and New Hampshire which favor the Pennsylvania rule, but there can be little doubt that that case is opposed to the principles of the common law, and its rule wholly inexpedient." In *Harrison v. Roy*, 39 Miss. 396, while, under the circumstances of that case, it was held that the wagoner had made himself liable as a common carrier, the court said that, if the transaction had been a mere isolated undertaking, such as he had not been in the habit of engaging in, and which was foreign to his regular and usual business, there would have been force in the position that he could not be so held. In *Steinman v. Wilkins*, 7 W. & S. (Pa.) 466, 42 Am. Dec. 254, it was held that a wagoner was not a common carrier to the extent of rendering him liable for a refusal to carry.

51. *Jenkins v. Pickett*, 9 Yerg. (Tenn.) 480; *Satterlee v. Groat*, 1 Wend. (N. Y.) 272; *Haynie v. Baylor*, 18 Tex. 498.

52. *Moses v. Bettis*, 4 Heisk. (Tenn.) 661, 13 Am. Rep. 1; *Craig v. Childress, Peck* (Tenn.), 270, 14 Am. Dec. 751; *Johnson v. Friar*, 4 Yerg. (Tenn.) 48; *Gordon v. Bu-*

been maintained in Tennessee, New Hampshire and South Carolina as to carriers by river craft, but, as to carriers by land the rule has been held to be the same as at common law.⁵³ But, in New York, it has been held that the owner of a sloop specially employed to make a trip, for a specified compensation, is not thereby known to be a common carrier and that the owner of a canal boat, generally used only in transporting freight for himself, applying to a common carrier, who has knowledge of the facts, and receiving a load of freight, does not thereby become liable as a common carrier.⁵⁴

§ 28. Truckmen, freightmen, draymen, cartmen, and porters.

Wagoners and teamsters, whose business it is to carry on hire goods and chattels from one locality to another, common porters, drivers, truckmen, freightmen, draymen, and cartmen, whether their employment be carried on from town to town, or from one part of a town to another are common carriers.⁵⁵ It is not neces-

chanan, 5 Yerg. (Tenn.) 71; Turney v. Wilson, 7 Yerg. (Tenn.) 340, 27 Am. Dec. 515; Moses v. Norris, 4 N. H. 304; Elkins v. Boston, etc., R. Co., 3 Fost. (N. H.) 275; McClure v. Hammond, 1 Bay (S. C.), 99; McClure v. Richardson, Rice (S. C.), 215.

53. Walker v. Skipwith, Meigs (Tenn.), 502. See § 26 as to "wagoners."

54. Allen v. Sackrider, 37 N. Y. 341; Fish v. Clark, 49 N. Y. 122, affg. 2 Lans. (N. Y.) 176.

55. Richards v. Westcott, 2 Bosw. (N. Y.) 569 (city expressman); Jackson Architectural Iron Works v. Hurlburt, 158 N. Y. 34, 52 N. E. 665, 70 Am. St. Rep. 432, affg. judg. 15 Misc. Rep. (N. Y.) 93, 36 N. Y. Supp. 808, 71 St. Rep. (N. Y.) 830; Benson v. Oregon Short Line R. Co., 99 Pac. 1072 (Utah, 1909), a drayman who is directed by a shipper to take her goods to the depot and

ship them is a common carrier. Story Bailm. § 496; Arkadelphia Milling Co. v. Smoker Merchandise Co., 139 S. W. 680 (Ark. 1911), a drayage company; Johnson Express Co. v. City of Chicago, 136 Ill. App. 368 (1907), a parcel delivery company; Robertson v. Kennedy, 2 Dana (Ky.), 431, 26 Am. Dec. 466, so held of the driver of a slide with an ox team; Powers v. Davenport, 7 Blackf. (Ind.) 497, 43 Am. Dec. 100; McHenry v. Philadelphia, etc., R. Co., 4 Har. (Del.) 448; Model Clothing Co. v. Columbia Transfer Co., 139 S. W. 242 (Mo. App. 1911), a drayage and transfer company; Collier v. Langan & Taylor Storage & Moving Co., 127 S. W. 435 (Mo. App. 1910); Campbell v. Morse, Harper (S. C.), 468; Gordon v. Hutchinson, 1 W. & S. (Pa.) 285; Lackey v. McDermott, 8 S. & R. (Pa.) 500; 2 Kent's Com. 598 n. The mode of transporting is immaterial. Where the defendant

sary that the exclusive business of the party should be carrying. Where one, whose principal pursuit is farming, solicits goods to carry to the market town in his wagon on certain convenient occasions, he makes himself a common carrier for those who employ him.⁵⁶ A company chartered to do a general warehouse and storage business, but engaging as well in moving household goods and advertising that business, in a way to solicit custom from the general public, is a common carrier, notwithstanding it claims the right to select those whom it will serve, and its custom is to discriminate, accepting some and rejecting others as it may choose.^{56a} The transportation must be in pursuance of some carriage vocation which the carrier exercises; but one may be a common carrier, who has no fixed termini, but leaves the course of transportation in each case to depend upon his customer's wish.⁵⁷ General truckmen who describe their specialty to be "heavy machinery," which they transport by wagons and trucks adapted to such purpose, and who make no discrimination as to customers, and do not refuse to move anything on request, if reasonably paid, are common carriers and liable as such, although a special price is fixed by agreement in each case.⁵⁸ But a person trucking goods for particular customers at prices fixed in each case by special contract is not a common carrier so as to be liable as an insurer of the goods.⁵⁹ A person engaged in the business of carrying freight in wagons from depots to other places, and of delivering packages for all persons who choose to employ him, is a common carrier.⁶⁰ One who, under a license so to do, hauls goods within the limits of a city for any person desiring his

was a lighterman, who carried goods between wharves and ships for any persons who chose to employ him, he was held liable as a common carrier. *Ingate v. Christie*, 3 C. & K. 61. Compare *Moses v. Boston, etc.*, R. Co., 24 N. H. 71; *Brind v. Dale*, 8 C. & P. 207.

56. *Jackson Architectural Iron Works v. Hurlbut*, *supra*; *Chevalier v. Strahan*, 2 Tex. 115, 47 Am. Dec. 639; *Harrison v. Roy*, 39 Miss. 396; *Schouler*, Bailm. 355, 356; *Ang. Carr.*

870, 871; *Staub v. Kendrick*, 121 Ind. 226, 6 L. R. A. 619.

56a. *Lloyd v. Haugh & Keenan Storage & Transfer Co.*, 223 Pa. 148, 72 Atl. 516.

57. *Alkali Co. v. Johnson*, L. R. 7 Exch. 267, L. R. 9 Exch. 338.

58. *Jackson Architectural Iron Works v. Hurlbut*, *supra*.

59. *Faucher v. Wilson*, 68 N. H. 338, 38 Atl. 1002, 39 L. R. A. 431.

60. *Cayo v. Pool's Assignee*, 55 S. W. (Ky.) 887, 49 L. R. A. 251.

services, is a common carrier; and, while he cannot be compelled to go beyond his territorial limits, yet, if he undertakes so to do, he is liable as a common carrier for the whole distance.⁶¹ It is sometimes a question of fact for the jury whether, under the circumstances of a case the person sought to be charged with liability is a common carrier or not.⁶² A truckman, whether or not a common carrier, is liable for failure to use ordinary care in unloading goods moved by him.^{62a} One engaged in trucking goods for particular customers, at prices fixed in each case by special contract, is bound only to exercise reasonable care in respect to the goods.^{62b} A regular tariff of charges is not essential to create a truckman a common carrier.^{62c}

§ 29. Owners and masters of ships and steamboats or vessels.

The master and owner of a general ship, or steam vessel, carrying goods for hire in internal, coasting or foreign commerce, is a common carrier with the liability of an insurer against losses, except from irresistible causes, as the act of God and public

61. *Farley v. Lavary*, 107 Ky. 523, 21 Ky. Law Rep. 1252, 47 L. R. A. 383, 54 S. W. 840. But a carrier who takes goods from a railroad office at the end of its line and transfers them to a connecting line is not a common carrier, but a mere agent of the first road, though he is in the habit of advancing its freight charges and collecting them, with his own transfer charges, from the connecting carrier. *Hooper v. Chicago, etc., R. Co.*, 27 Wis. 81, 9 Am. Rep. 439. Compare *Parmalee v. Lowitz*, 74 Ill. 116, 24 Am. Rep. 276.

62. *Schloss v. Wood*, 11 Colo. 287, 17 Pac. 910, 35 Am. & Eng. R. Cas. 492.

Furniture mover not a common carrier.—Where defendant corporation engaged in furniture moving, contracted to move plaintiff's furniture for a certain price, and its agent stated that defendant had previously

safely moved furniture and bric-a-brac for others, was responsible, and would move plaintiff's furniture with care and deliver it safely, defendant did not thereby assume the responsibility of a common carrier, but was only liable as a bailee for hire for negligence of its servants. *Jaminet v. American Storage & Moving Co.*, 109 Mo. App. 257, 84 S. W. 128.

62a. *Jackson Architectural Iron Works v. Hurlbut*, 158 N. Y. 34, 52 N. E. 665, 70 Am. St. Rep. 432, affg. judg. 15 Misc. Rep. 93, 36 N. Y. Supp. 808. The question as to contributory negligence, in that plaintiff ordered the machinery to be unloaded at once, on its delivery after dark, is for the jury. *Id.*

62b. *Faucher v. Wilson*, 68 N. H. 338, 38 Atl. 1002, 39 L. R. A. 431.

62c. *Jackson Architectural Iron Works v. Hurlbut*, *supra*.

enemies.⁶³ When engaged in the coasting trade, or upon the lakes, bays and sounds, transporting goods from one port to another for the general public, for hire, steamboats or vessels are common carriers.⁶⁴ Likewise, steamboats upon navigable

63. Liverpool & G. W. Steam. Co. v. Phoenix Ins. Co., 129 U. S. 397, 32 L. Ed. 788, 5 R. R. & Corp. L. J. 435, 39 Alb. L. J. 373, 9 Sup. Ct. Rep. 469; Hall v. Connecticut River Steamboat Co., 13 Conn. 324; Peters v. Rylands, 20 Pa. St. 497; Tuckerman v. Brown, 17 Barb. (N. Y.) 191; Saltus v. Everett, 20 Wend. (N. Y.) 267; Jencks v. Coleman, 2 Sumner (U. S.), 221; Dibble v. Brown, 12 Ga. 217; The Emily, 5 Kan. 645; Wilsons v. Hamilton, 4 Ohio St. 722; Dunseth v. Wade, 2 Scam. (Ill.) 285; King v. Shepherd, 3 Story (U. S.), 349; Hastings v. Pepper, 28 Mass. (11 Pick.) 41; Gage v. Tirrell, 9 Allen (Mass.), 299; Clark v. Barnwell, 12 How. (U. S.) 272; The Niagara v. Cordes, 21 How. (U. S.) 7; The Delaware, 14 Wall (U. S.) 579; The Maggie Hammond, 9 Wall. (U. S.) 435; Garrison v. Memphis Ins. Co., 19 How. (U. S.) 312; The Lady Pike, 21 Wall. (U. S.) 14; Williams v. Grant, 1 Conn. 487, 7 Am. Dec. 235; Clark v. Richards, 1 Conn. 54; Richards v. Gilbert, 5 Day (Conn.), 415; Bennet v. Filyaw, 1 Fla. 451; Dwight v. Brewster, 1 Pick. (Mass.) 50, 11 Am. Dec. 133; Gilmore v. Carman, 1 Smed. & M. (Miss.) 279, 40 Am. Dec. 96; Colt v. McMechen, 6 Johns. (N. Y.) 160, 5 Am. Dec. 200; Schieffelin v. Harvey, 6 Johns. (N. Y.) 170, 5 Am. Dec. 206; Bowman v. Teall, 23 Wend. (N. Y.) 306, 35 Am. Dec. 562; Bell v. Reed, 4 Binn. (Pa.) 127, 5 Am. Rep. 398; Miles v. James, 1 McCord L. (S. C.) 157; Cohen v.

Hume, 1 McCord L. (S. C.) 439; Murphy v. Staton, 3 Munf. (Va.) 239; Steele v. McTyer, 31 Ala. 667, 70 Am. Dec. 516; Nugent v. Smith, 1 C. P. Div. 423; Morse v. Slue, 1 Vent. 190; Boson v. Sanford, 2 Salk. 440; Laveroni v. Drury, 8 Exch. 166, 16 Eng. L. & E. 510; Coggs v. Bernard, 2 Ld. Raym. 909. *Compare* Smith v. Pierce, 1 La. 349; Adams v. New Orleans Tow-boat Co., 11 La. 46; Walston v. Myers, 5 Jones (N. C.) 174; White v. The Mary Ann, 6 Cal. 462; Ashmore v. Penn. Steam Tow Co., 28 N. J. L. 180, and cases cited § 19.

64. Hale v. New Jersey Steam Nav. Co., 15 Conn. 539, 39 Am. Dec. 398; Powell v. Myers, 26 Wend. (N. Y.) 591; Pardee v. Drew, 25 Wend. (N. Y.) 459; Allen v. Sewall, 2 Wend. (N. Y.) 327, 6 Wend. (N. Y.) 335; Elliott v. Rossell, 10 Johns. (N. Y.) 1, 6 Am. Dec. 306; Garrison v. Memphis Ins. Co., 19 How. (N. Y.) 312; Kemp v. Coughtry, 11 Johns. (N. Y.) 107; Gage v. Tirrell, 9 Allen (Mass.), 299; Crosby v. Fitch, 12 Conn. 410, 31 Am. Dec. 745; Schooner Reeside, 2 Sumn. (U. S.) 567; Gordon v. Little, 8 S. & R. (Pa.) 533, 11 Am. Dec. 632; McClure v. Hammond, 1 Bay (S. C.), 99, 1 Am. Dec. 598; Sch'r Emma Johnson, 1 Spr. (U. S.) 527; Hastings v. Pepper, 28 Mass. (11 Pick.) 41; Parker v. Flagg, 26 Me. 181, 45 Am. Dec. 101; Oakey v. Russell, 18 Mar. (La.) 58; The Propeller Commerce, 1 Black (U. S.), 582; The Niagara v. Cordes, 21

rivers, which carry both passengers and freight, are liable as common carriers, as to such freight and the baggage of their passengers.⁶⁵ But, an ocean steamship company is not responsible, as a common carrier or an innkeeper, for the baggage of a passenger, which he keeps in his own possession in his stateroom, but must answer in such cases, for its negligence, like other bailees for hire.⁶⁶ And a vessel chartered to transport a specific cargo is not a common carrier.⁶⁷ Where the vessel is chartered by another who is using it for transportation generally, the party chartering and in control of the vessel, and not the owner, is liable; and when the vessel is run by the master on shares, the owner is not liable merely by virtue of his ownership, for goods entrusted to the master for transportation.⁶⁸ A vessel under charter, which was under no obligation to take whatever goods might be tendered, and not running on any particular schedule or between particular places, is not a common carrier in the legal sense of the term, but a private carrier only.^{68a} Where two corporations created by different states exist under the same name, one maintaining a steamboat line as a common carrier and the other merely owning land and wharves, the latter will not be

How. (U. S.) 26; *Clark v. Barnwell*, 12 How. (U. S.) 272; *The Commander-in-chief*, 1 Wall. (U. S.) 51. Compare *Aymar v. Astor*, 6 Cow. (N. Y.) 266; *Crosby v. Fitch*, 12 Conn. 410, 31 Am. Dec. 745, and cases cited § 19.

65. *Citizens' Bank v. The Nantucket S. B. Co.*, 2 Story (U. S.), 16; *McGregor v. Kilgore*, 6 Ohio, 358, 27 Am. Dec. 260; *Bowman v. Hilton*, 11 Ohio, 303; *McArthur v. Sears*, 21 Wend. (N. Y.) 190; *Dunseth v. Wade*, 2 Scam. (Ill.) 285; *Hart v. Allen*, 2 Watts (Pa.), 114; *Harrington v. McShane*, 2 Watts (Pa.), 443, 27 Am. Dec. 321; *Warden v. Greer*, 6 Watts (Pa.), 424; *Pardee v. Drew*, 25 Wend. (N. Y.) 459; *Porterfield v. Humphreys*, 8 Humph. (Tenn.) 497; *Kirtland v. Montgomery*, 1 Swan

(Tenn.), 452; *Swindler v. Hilliard*, 2 Rich. (S. C.) 286, 45 Am. Dec. 732; *Hollister v. Nowlen*, 19 Wend. (N. Y.) 234; *Cole v. Goodwin*, 19 Wend. (N. Y.) 251; *Hale v. N. J. Nav. Co.*, 15 Conn. 539; *Jones v. Pitcher*, 3 Stew. & P. (Ala.) 135, 24 Am. Dec. 716; *Sprowl v. Kellar*, 4 Stew. & P. (Ala.) 382.

66. *American Steamship Co. v. Bryan*, 83 Pa. St. 446.

67. *The Dan* (D. C. S. D. N. Y.), 40 Fed. Rep. 691.

68. *Tuckerman v. Brown*, 17 Barb. (N. Y.) 191; *Thompson v. Hamilton*, 12 Pick. (Mass.) 425, 23 Am. Dec. 619; *Cutler v. Winsor*, 6 Pick. (Mass.) 335, 3 Kent's Com. 158; *Manter v. Holmes*, 10 Metc. (Mass.) 402.

68a. *The Pawnee*, 205 Fed. 333.

liable as a common carrier for property delivered to the former for transportation, unless it held itself out to the general public as a common carrier or permitted the other company to use its corporate name.^{68b}

§ 30. Lightermen and hoymen.

A lighterman who carries goods between wharves and ships for any persons who choose to employ him is liable as a common carrier.^{68c} Under the rule of the American courts of admiralty a lighter hired exclusively to convey the goods of one person to a particular place for an agreed compensation is not a common carrier with respect to such goods, but a private carrier, and liable only as a bailee for hire.^{68d}

§ 31. Owners of a toll bridge.

The owner of a toll bridge is not a common carrier, for, in general he has no possession or control over the goods. He is bound to keep the bridge in proper condition for the safe passage of passengers and goods, and is liable only for negligence in so keeping it.⁶⁹ A bridge company owning no freight cars, which solicits freight for railway companies who will furnish the cars and over whose lines the freight is to go, and merely transfers such cars over its bridge to the railway companies furnishing them, charging for its service its regular bridge toll, but making no charge for transporting the freight contained or carried in the cars, is not a common carrier of such interstate freight.⁷⁰

68b. *Reed v. Wilmington Steamboat Co.*, 1 Marv. (Del. Super.) 193, 40 Atl. 955.

68c. *Ingate v. Christie*, 3 C. & K. 61. See § 28, note 55, *supra*.

68d. *The Wildenfels*, 161 Fed. 864; *The Rover*, 161 Fed. 864. See, also, *Fish v. Chapman*, 2 Ga. 353, 46 Am. Dec. 393.

69. *Grigsby v. Chappell*, 5 Rich. (S. C.) 443, wherein Evans, J., says: "He is not like a stage owner or a railroad company. In these cases the passenger is passive, the government

of the stage or the car is under the driver or the engineer. But in crossing a bridge the acts and conduct of a passenger are regulated by his own will. . . . He is more like the owner of a turnpike road, and his liabilities are analogous."

70. *Kentucky & I. Bridge Co. v. Louisville & N. R. Co.* (C. C. D. Ky.), 37 Fed. Rep. 567, 2 L. R. A. 289, 2 Inters. Com. Rep. 351.

The franchises and powers of building, maintaining, and operating a bridge and approaches, designated as

In an action for injuries sustained by plaintiff while passing through a covered, unlighted toll bridge, by being struck by a bicycle rider from the rear, an instruction imposing on the bridge company the duty of exercising ordinary care only, was more favorable to it than the law authorized; such a corporation being required to exercise a degree of care more nearly akin to that required of a carrier of passengers.^{70a} Where a railway company has built a bridge with a draw, and under a contract with the city had turned over the control and care of a footpath thereon to the city, and the company gave the ordinary signals, and opened the draw in a proper manner, it was not guilty of negligence resulting in the death of a boy who walked off the draw into the water and was drowned.^{70b} A toll bridge company, though not a common carrier, is under the duty to keep its bridge in a reasonably safe condition for travel, and is only liable for negligence in failing to so keep it.^{70c} While not the insurer of the person or property of their customers, it is the duty of the proprietors of a toll bridge to exercise ordinary care in its construction and maintenance, and to make reasonable provision to guard against injuries likely to be sustained in the ordinary use of the bridge, so that, where guard rails are reasonably necessary, the owner must construct and maintain them.^{70d}

§ 32. Canal companies.

A company maintaining for their own profit a canal, open to

its terminal facilities, do not, in and of themselves constitute the bridge company a common carrier of property; nor do they, by any clear implication, confer upon it authority "to equip its road, and to transport goods and passengers thereon, and charge compensation therefor." *Id.*

Where a railroad company, by contract with a bridge company, acquires the right to use a bridge, with its approaches, for its engines, cars and trains, it is regarded, under the Act to Regulate Commerce, § 1, as the owner or operator of the bridge and approaches, for the time being, as to

all freight transported by it over the bridge. And as to all such traffic, it, and not the bridge company, must be regarded as the common carrier. *Id.*

70a. *Conowingo Bridge Co. v. Hedrick*, 95 Md. 669, 53 Atl. 430.

70b. *Desure v. New York Cent., etc., R. Co.*, 94 App. Div. (N. Y.) 251, 87 N. Y. Supp. 988.

70c. *Gibler v. Terminal R. Ass'n of St. Louis*, 203 Mo. 203, 101 S. W. 37.

70d. *Dardanelle Pontoon Bridge & Turnpike Co. v. Croom* (Ark.), 129 S. W. 280.

the public for navigation upon the payment of tolls, is not a common carrier, and is only bound to take reasonable care that its canal may be navigated without danger; and it is not responsible for accidents which do not arise from the want of such reasonable care. It is not, like a common carrier, subjected to the responsibility of an insurer.⁷¹ The Pennsylvania Canal Company is neither liable as a common carrier nor as an insurer. As owner and operator of a public water highway, it is bound to so maintain and manage the canal that it can be used with reasonable safety and convenience by the public, but it is not liable for an injury resulting from an unknown obstruction, which could not have been guarded against without the exercise of extraordinary and unreasonable care.⁷² An incorporated canal company, whose business is to maintain and keep open a waterway for the use of the public, taking tolls for such use, is not liable as a common carrier, in the absence of special contract, for the loss of timber from rafts transported by it and lying in the basins or in the canal itself, by theft, sinking or otherwise.⁷³ A complaint in an action against a canal company, which alleged that defendant agreed to tow plaintiff's schooner through the canal by defendant's tug, and negligently, wrongfully, and carelessly obstructed its said canal by a large barge which it owned, and negligently, carelessly, and wrongfully caused plaintiff's schooner to be towed by its tug down and upon the said barge, and to run foul of and to strike against said barge, and by reason of the obstruction of the canal and the said defendant's towing said schooner down and upon said barge said schooner was greatly

71. *Exchange Fire Ins. Co. v. Delaware & Hudson Canal Co.*, 25 N. Y. Super. Ct. (10 Bosw.) 180; *Weitner v. Delaware & Hudson Canal Co.*, 27 N. Y. Super. Ct. (4 Rob.) 234. "There is no consideration of public policy to enlarge the liability of the owners of a canal beyond the employment of reasonable diligence. Unless they owned the canal boats, they could reap no real benefit from either the simulated or real destruc-

tion of them or their cargoes, and, therefore, there is no reason for putting them on a footing with common carriers so as to render them insurers. No case has been cited which goes to this length." *Robertson, J.*, in case first cited, *supra*.

72. *Pennsylvania Canal Co. v. Burd*, 90 Pa. St. 281, 35 Am. Rep. 659.

73. *Watts v. Savannah, etc., Canal Co.*, 64 Ga. 88, 37 Am. Rep. 53.

damaged, sufficiently charges negligence in mooring the barge as the basis of plaintiff's demand.^{73a} A railroad company, although having the right under state authority to erect an abutment and pier for a bridge over a public canal, if it maintains the same so as to create hidden or dangerous obstructions to navigation and to cause injury to crafts rightfully using the canal, is liable for such injury.^{73b} Where the undisputed evidence discloses a special injury to a person navigating the Schuylkill canal, from a depletion of the waters therein, that question need not be submitted to the jury.^{73c}

§ 33. Forwarding merchants.

A forwarder of goods, who takes upon himself all the expenses of transportation, for which he receives a compensation from the owner, but who has no concern in the means of transportation, or interest in the freight, is not a common carrier, but is liable as warehouseman.⁷⁴ He is not an insurer of the safety of the

73a. *Gillikin & Gaskell v. Lake Drummond Canal Co.*, 147 N. C. 39, 60 S. E. 654, holding also that a barge negligently moored to the bank of a canal, which because of such negligence floats out into the channel of the canal causing a collision with a passing vessel, is clearly within the meaning of the term "obstruction."

73b. *The Nonpariel*, 149 Fed. 521.

A railroad company, which maintained a bridge over the Erie canal, with piers resting on submerged cribs extending beyond the piers on the canal side, which were not protected or marked in any way to show their location, is liable for an injury to a canal boat and damage to her cargo resulting from her collision with such crib, which was not apparent to her master, who exercised ordinary skill and care in her navigation. *Id.*

73c. *Gallagher v. City of Philadelphia*, 4 Pa. Super. Ct. 60.

74. *Roberts v. Turner*, 12 Johns. (N. Y.) 232, 7 Am. Dec. 311; *Platt v. Hibbard*, 7 Cow. (N. Y.) 497; *Ackley v. Kellogg*, 8 Cow. (N. Y.) 223; *Sage v. Gittner*, 11 Barb. (N. Y.) 120; *Cowles v. Pointer*, 26 Miss. 253; *Maybin v. South Carolina, etc., R. Co.*, 8 Rich. (S. C.) 240, 64 Am. Dec. 753; *Denny v. New York, etc., R. Co.*, 13 Gray (Mass.), 487, 74 Am. Dec. 645; *Nichols v. Smith*, 115 Mass. 332; *Briggs v. Boston, etc., R. Co.*, 6 Allen (Mass.), 246; *Brown v. Dennison*, 2 Wend. (N. Y.) 593; *Stannard v. Princee*, 64 N. Y. 300; *Teall v. Sears*, 9 Barb. (N. Y.) 317; *Wade v. Wheeler*, 3 Lans. (N. Y.) 201; *Story*, Bailm. § 502.

Forwarders.—Plaintiffs were forwarding merchants at T., and were employed by defendant to ship certain marble to him at P. The marble was shipped on a canal boat, which proceeded on the way as far as A. Learning that it was there

goods delivered to him for transportation, but is liable only for his own negligence and that of his agents or servants.⁷⁵ When a person or corporation act both as forwarder and carrier, their liability in each capacity is separate and distinct, and whether or not they are liable as carrier, or merely as forwarder, depends upon the circumstances and conditions of each particular case.⁷⁶ A custom extending over a great num-

delayed, one of the plaintiffs went to A, and there learned that the only towboat company it was practicable to employ to tow the boat down the H. river declined to take the boat unless the captain would pay an old bill, and would pay in advance the charge for towing. The captain had gone home to procure the money. Plaintiffs thereupon advanced the money, and the boat was put into a tow and, by the negligence or unskillfulness of the employes of the towboat company, was injured and sunk. In an action to recover for advances and charges, wherein the loss was set up as a counterclaim, it was held that plaintiffs acted simply as forwarders, not as carriers; that, by the transactions at A. they did not assume the carriage of the property; that they had a right, and it was their duty, to pay the advance charges, and, although the defendant was not liable for the advance on the account of the captain, it was for his benefit, and he could not complain; and that as the loss did not occur by any negligence on the part of plaintiffs, and was not a natural or ordinary consequence of any act of theirs, they were not liable therefor. *Stan-nard v. Prince*, 64 N. Y. 300.

75. *Roberts v. Turner*, 12 Johns. (N. Y.) 232, 7 Am. Dec. 311; *Chris-*

tenson v. American Express Co., 15 Minn. 270, 2 Am. Rep. 122; *Hooper v. WeHs*, 27 Cal. 11, 85 Am. Dec. 211.

76. *Ladue v. Griffith*, 25 N. Y. 364; *Blossom v. Griffin*, 13 N. Y. 569, 67 Am. Dec. 75; *Teall v. Sears*, 9 Barb. (N. Y.) 317; *Roberts v. Turner*, 12 Johns. (N. Y.) 232, 7 Am. Dec. 311; *Kreuder v. Woolcott*, 1 Hilt. (N. Y.) 223; *Clarke v. Needles*, 25 Pa. St. 338; *Mellier v. St. Louis, etc., Transp. Co.*, 14 Mo. App. 281; *Parmalee v. Western Transp. Co.*, 26 Wis. 439; *Plantation No. 4 v. Hall*, 61 Me. 517; *Burroughs v. Norwich, etc., R. Co.*, 100 Mass. 26, 1 Am. Rep. 78; *Mercantile Mut. Ins. Co. v. Chase*, 1 E. D. Smith (N. Y.), 115; *Maybin v. South Carolina R. Co.*, 8 Rich. L. (S. C.) 240, 64 Am. Dec. 753.

Proofs that persons claiming to be only forwarders, and not common carriers, are engaged in the business of receiving merchandise from a railroad company at its terminus, for delivery by them at a neighboring town, and that they have an office at such town, where they collect freight bills and solicit business, is sufficient to warrant a submission to the jury of the question whether they are common carriers or not. *Schloss v. Wood*, 11 Colo. 287, 17 Pac. 910, 35 Am. & Eng. R. Cas. 492.

ber of years between parties, showing that one of the parties had always been a forwarder and not a carrier established a relationship which cannot be changed, in the absence of evidence that the parties had entered into a contract different in character from those they had been in the custom of entering into in the course of their long continued dealings.^{76a} Forwarding companies which undertake for hire to transport baggage from its starting point to its final destination, such transaction being within the ordinary course of their business, are common carriers within the meaning of the law.^{76b} An alleged forwarding agent who receives goods for transit, issues bills of lading, and makes contracts in his own name with a railroad company for carriage, is, as to a person with whom it contracts for the delivery of goods, a common carrier, and liable as such.^{76c} Even if the expressed purpose of a forwarding company's business were material, its designation that it was a "forwarder" and "distributor" would be sufficient to estop it from claiming that it was a mere forwarder and not a common carrier.^{76d} A "forwarding merchant" or "forwarder" is one who ships or sends forward goods for others to their destination by the instrumentality of third persons without himself incurring the liability of a carrier to deliver them, and neither includes a consignor shipping goods nor a carrier engaged in transporting them.^{76e}

§ 34. Warehousemen and wharfingers.

Warehousemen and wharfingers, acting strictly as such, and confining themselves to the business which their names import, cannot be held liable as common carriers, their business being simply to receive and store goods and merchandise or to ship them to their destination, for hire.⁷⁷ But when a person or company

76a. *Barasch v. Richards*, 113 N. Y. Supp. 1005.

76b. *Bare v. American Forwarding Co.*, 146 Ill. App. 338, *affd.* 89 N. E. 1021.

76c. *Ingram v. American Forwarding Co.*, 162 Ill. App. 476.

76d. *Lee v. Fidelity Storage & Transfer Co.*, 51 Wash. 208, 98 Pac. 658.

76e. *In re Emerson, Marlow & Co.*, 199 Fed. 95, 117 C. C. A. 635; 199 Fed. 99, 117 C. C. A. 639.

77. *Platt v. Hibbard*, 7 Cow. (N. Y.) 497; *Knapp v. Curtis*, 9 Wend. (N. Y.) 60; *Roberts v. Turner*, 12 Johns. (N. Y.) 232, 7 Am. Dec. 311; *Bouvier's L. Dict.*

Wharfingers who describe themselves as such and also as lightermen

is at the same time a warehouseman or wharfinger and carrier, if the deposit of the goods in the warehouse or on the wharf is a mere accessory to the carriage, in other words, if they are deposited for the purpose of being carried without further orders, the responsibility of the carrier, as a common carrier, begins from the time they are received, the duty to transport having actually arisen.⁷⁸ Whenever the goods are not to be shipped in the regular course of business, but are to be retained to await the orders of the shipper, the carrier's liability is that of a warehouseman until the orders are given to forward the goods, when his liability as a common carrier commences.⁷⁹ So, when any-

and carmen, and who carry goods from their wharf for their wharf customers, but not for strangers unless at arranged prices and unless they consider the business good, are not carriers, or, at least, not common carriers, *Chattock v. Bellamy*, 54 L. J. Q. B. (N. S.) 250, 15 Rep. 340. *Compare* *Maving v. Todd*, 1 Stark. 72, 2 E. C. L. 37; *Cobban v. Downe*, 5 Esp. N. P. 41; *British Columbia, etc., Spar, etc., Co. v. Nettleship*, L. R. 3 C. P. 499.

78. *Blossom v. Griffin*, 13 N. Y. 569; *Ladue v. Griffith*, 25 N. Y. 364; *Read v. Spaulding*, 30 N. Y. 630, 34 N. Y. 497, 47 Barb. (N. Y.) 152; *Barron v. Eldridge*, 100 Mass. 455; *Rogers v. Wheeler*, 52 N. Y. 262, 6 Lans. (N. Y.) 420; *O'Neil v. New York Cent., etc., R. Co.*, 60 N. Y. 138, 10 Am. Ry. Rep. 121.

The owner of a warehouse who contracts with the owner of goods stored therein, to deliver them at her house at a specified time, three or four hours later, is liable as a common carrier instead of a warehouseman, although the goods remain in the warehouse, where they are destroyed by fire less than an hour before the time agreed on for delivery. *Snell-*

ing v. Yetter, 25 App. Div. (N. Y.) 590, 27 Civ. Pro. (N. Y.) 158, 49 N. Y. Supp. 917.

79. *O'Neil v. New York Cent., etc., R. Co.*, 60 N. Y. 138; *Platt v. Hibbard*, 7 Cow. (N. Y.) 499; *Michigan Southern, etc., R. Co. v. Shurtz*, 7 Mich. 515; *Little Rock, etc., R. Co. v. Hunter*, 42 Ark. 200, 18 Am. & Eng. R. Cas. 527; *St. Louis, etc., R. Co. v. Montgomery*, 39 Ill. 335; *Moses v. Boston, etc., R. Co.*, 24 N. H. 71, 55 Am. Dec. 222; *Rogers v. Wheeler*, 52 N. Y. 262; *Fitchburg, etc., R. Co. v. Hanna*, 6 Gray (Mass.) 539; *Barron v. Eldridge*, 100 Mass. 455; *Nichols v. Smith* 115 Mass. 332; *Dickinson v. Winchester*, 4 Cush. (Mass.) 114, 50 Am. Dec. 760; *Illinois Cent. R. Co. v. Tronstine*, 64 Miss. 834, 2 So. 255; *Basnight v. Atlantic, etc., R. Co.*, 111 N. C. 592; *Pittsburgh, etc., R. Co. v. Barrett*, 36 Ohio St. 448, 3 Am. & Eng. R. Cas. 256; *Schmidt v. Chicago, etc., R. Co.*, 90 Wis. 504; *Milloy v. Grand Trunk R. Co.*, 23 Ont. Rep. 454, 55 Am. & Eng. R. Cas. 579; *Foard v. Atlantic, etc., R. Co.*, 8 Jones L. (N. C.) 235, 78 Am. Dec. 277; *Goodbar v. Wabash R. Co.*, 53 Mo. App. 434.

thing remains to be done by the shipper, after the delivery of the goods for transportation, the liability of the carrier as an insurer does not commence, and he is responsible only as a warehouseman, until the conditions have been performed upon which their transportation was suspended.⁸⁰

§ 35. Postmasters, mail contractors, and mail carriers.

The constitution of the United States bestows upon Congress power "to establish post-offices and post-roads."⁸¹ The postal service is organized and maintained as one of the departments of the General Government.⁸² The regulation and conduct of the post offices and the entire postal service, including the money order system and other branches, is provided for in the statutes under the title "The Postal Service."⁸³ The Postmaster-General, local postmasters, mail contractors, and mail carriers act in the character of public officers or agents; they enter into no contracts with individuals who derive benefit from their services, and receive no hire from them, like common carriers, in proportion to the value of the letters or merchandise carried by them; but their contracts are with the government, from whom they receive only a general compensation. They are, therefore, not liable, as common carriers for the safety of such things as may be transmitted through the mails, or for the malfeasance or embezzlement of clerks and deputies duly employed by them; but they must answer for the use of reasonable diligence in discharging their duties.⁸⁴ A postmaster is liable as a public officer, to the gov-

80. *Wade v. Wheeler*, 3 Lans. (N. Y.) 201; *St. Louis, etc., R. Co. v. Knight*, 122 U. S. 79, 7 Sup. Ct. 1132, 30 L. Ed. 1077; *Alabama, etc., R. Co. v. Mt. Vernon Co.*, 84 Ala. 173; *Cairus v. Robins*, 8 M. & W. 258; *Barron v. Eldridge*, 100 Mass. 455, 1 Am. Rep. 126; *Watts v. Boston, etc., R. Corp.*, 106 Mass. 467; *Illinois Cent. R. Co. v. Ashmead*, 58 Ill. 487; *Illinois Cent. R. Co. v. McClellan*, 54 Ill. 58, 5 Am. Rep. 83; *Illinois Cent. R. Co. v. Homberger*, 77 Ill. 457; *Mulligan v. Northern Pac-*

R. Co. (Dak.), 29 N. W. 659, 27 Am. & Eng. R. Cas. 33; *Milloy v. Grand Trunk R. Co.*, 21 Ont. App. 404, revg. 23 Ont. Rep. 454, 55 Am. & Eng. R. Cas. 579; *Basnight v. Atlantic, etc., R. Co.*, 111 N. C. 592.

81. U. S. Const. art. 1, § 8, par. 7.

82. R. S. U. S. pp. 65-70.

83. R. S. U. S. pp. 750-783.

84. *Central R., etc., Co. v. Lampley*, 76 Ala. 357, 52 Am. Rep. 334, 23 Am. & Eng. R. Cas. 720; *Powell v. Mills*, 30 Miss. 231, 64 Am. Dec. 158; *Wiggins v. Hathaway*, 6 Barb. (N.

ernment, for the discharge of the general duties imposed on him by statute;⁸⁵ and to individuals, in either a United States or State court, for money or property lost or stolen from his office through his negligence or wrongful act, or that of his assistants or servants, whereby special damage is sustained;⁸⁶ and to an action of trover, for unlawfully refusing to deliver mail matter to an individual, to whom it is addressed.⁸⁷ A railroad carrying mail for the government owes no duty to the addressee of a

Y.) 632; *Franklin v. Low and Swartwout*, 1 Johns. (N. Y.) 396; *Conwell v. Voorhees*, 13 Ohio, 523, 42 Am. Dec. 206; *Schroyer v. Lynch*, 8 Watts (Pa.), 453; *Dunlop v. Munroe*, 7 Cranch (U. S.), 242; *Bolan v. Williamson*, 2 Bay (S. C.), 551, 1 Brev. (S. C.) 181; *Maxwell v. McIvry*, 2 Bibb. (Ky.) 211; *Foster v. Metts*, 55 Miss. 77, 30 Am. Rep. 504; *Hutchins v. Brackett*, 22 N. H. 252, 53 Am. Dec. 248; *Story Bailm.* § 463; 2 Kent's Com. 610. Compare *Sawyer v. Corse*, 17 Gratt. (Va.) 230, 94 Am. Dec. 445; *Christy v. Smith*, 23 Vt. 663; *Ford v. Parker*, 4 Ohio St. 576; *Fitzgerald v. Burrill*, 106 Mass. 446; *Bishop v. Williamson*, 11 Me. 495.

By the common law and in the days of private posts a liability as common carriers naturally attached to postmasters. *Jones Bailm.* 109, 110. A mail carrier is not an officer of the Government, but is the private agent of the contractor for carrying the mail, and the contractor is liable to third persons for any injury or loss, as of money in a letter, sustained through the negligence or default of such agent in the performance of his duties. *Hall v. Smith*, 2 Bing. C. P. 156, 9 E. C. L. 357; *Holliday v. St. Leonard*, 103 E. C. L. 192.

The same principle that gives relief against a contractor with the govern-

ment gives the like relief against an officer of government. *Robinson v. Chamberlain*, 34 N. Y. 389; *Hicks v. Dorn*, 42 N. Y. 47; *Hover v. Barkhoof*, 44 N. Y. 113.

When the government assumed control of the post office (stat. 12 Car. II) it was held that the postmaster was not liable for the loss of a letter with exchequer bills in it, and that postmasters enter into no contracts with individuals, and receive no hire, like common carriers, in proportion to the value of the letters under their charge, but only a general compensation from government, and are, therefore, not liable, as common carriers. *Lane v. Cotton*, 1 Ld. Raym. 646; *Whitfield v. Le Desprur*, Cowp. K. B. 754.

85. *Strong v. Campbell*, 11 Barb. (N. Y.) 135.

86. *Idaho Gold Reduction Co. v. Croghan* (Id.), 56 Pac. 164; *Bishop v. Williamson*, 11 Me. 495; *Coleman v. Frazier*, 4 Rich. (S. C.) 146, 53 Am. Dec. 727; *Bolan v. Williamson*, 1 Brev. (S. C.) 181, 2 Bay (S. C.), *Sawyer v. Corse*, 17 Gratt. (Va.) 230, 94 Am. Dec. 445.

87. *Teall v. Felton*, 1 N. Y. 537, 3 Barb. (N. Y.) 512, 12 How. (U. S.) 284; *Bank of Columbia v. Lawrence*, 1 Pet. (U. S.) 578; *Nevins v. Bank of Lansingburgh*, 10 Mich. 547.

package rendering the railroad liable for the loss of the same through its negligence; but conceding that it may be liable to such addressee for the loss of the same in the mail through its negligence, the degree of care required is only the reasonable care exacted of an ordinary bailee for hire.⁸⁸ A contractor to carry the mail between the railroad station and the post office in a town is not a common carrier and owes a railroad mail clerk no further duty than the exercise of reasonable care.^{88a}

§ 36. Log-carrying, or log-driving, or boom companies.

One who contracts to cut a lot of timber and transport it to a place where it is to be delivered and used, does not act, while transporting the timber, as a common carrier, and incur responsibility as such; he is only liable for the want of ordinary prudence, care and skill.⁸⁹ A boom company, engaged in the business of driving and booming logs, for any person having logs to be driven, and charging regular rates therefor, is not a common carrier, nor subject to the common-law liabilities of carriers.⁹⁰ A constitutional provision, providing that all railroads are public highways, and all railroad companies common carriers, does not have the effect of making a business corporation organized to construct and operate a sawmill and a railroad in connection therewith, which constructs a logging railroad on its private grounds, and operates the same for private purposes, a common carrier, charged with the duties and responsibilities imposed by law on such carriers.⁹¹ The responsibilities of a private carrier, operating a railroad for the purposes of its own business, and permitting persons to travel gratuitously on such road, are different from those of common carriers for hire; and, in an action against such a private carrier for damages caused by its alleged negligence, it is not error to refuse instructions to the

88. *German State Bank v. Minneapolis, etc., R. Co.* (U. S. C. C. Minn.), 113 Fed. 414.

88a. *Davis v. Crisham*, 213 Mass. 151, 99 N. E. 959.

89. *Pike v. Nash*, 3 Abb. App. Dec. (N. Y.) 610, 1 Keyes (N. Y.), 335.

90. *Mann v. White River Log &*

Booming Co., 46 Mich. 38, 8 N. W. 550, 41 Am. St. Rep. 141; *Chesley v. Mississippi & R. R. Boom Co.*, 39 Minn. 83, 38 N. W. 769.

91. *Wade v. Litcher & Moore Cypress Lumber Co.*, 74 Fed. 517, 20 C. A. 515, 41 U. S. App. 45; Const. of La., art. 244.

jury based upon the rules as to the liability of common carriers.^{91a} In an action against a logging company for personal injuries caused by the derailment of a train on its logging road, on which the plaintiff was riding, it appeared that the defendant's sole business was logging, and it had never authorized the use of its road for carrying passengers; but there was evidence that the defendant's general superintendent had instructed the plaintiff, who had come to the logging camp in search of work, to get on the train, and go for his blankets, so as to return and go to work and also evidence that the trains were used, with the knowledge of the defendant, for carrying people up and down the road. It was held that it was not error to refuse to direct a verdict for the defendant.^{91b}

§ 37. Telegraph companies.

Telegraph companies are not insurers of the safe and accurate transmission of messages, and, like common carriers, liable for all losses resulting from an incorrect transmission, unless occasioned by an act of God or of the public enemy.⁹² The reasons

91a. *Wade v. Lutchter & Moore Cypress Lumber Co.*, *supra*.

91b. *Albion Lumber Co. v. De No-bra*, 72 Fed. 739, 19 C. C. A. 168, 44, U. S. App. 347.

92. Not liable as insurers.—*Breese v. United States Teleg. Co.*, 48 N. Y. 132, 141, 8 Am. Rep. 526, affg. 45 Barb. (N. Y.) 274, 31 How. Pr. (N. Y.) 86; *Leonard v. New York, etc., Teleg. Co.*, 41 N. Y. 544, 571, 1 Am. Rep. 446; *De Rutte v. New York, etc., Tel. Co.*, 1 Daly (N. Y.), 547, 30 How. Pr. (N. Y.) 403; *Schwartz v. Atlantic, etc., Tel. Co.*, 1 Am. Electl. Cas. 284, 18 Hun (N. Y.) 157; *Ellis v. American Tel Co.*, 13 Allen (Mass.), 232; *Western Union Tel. Co. v. Griswold*, 37 Ohio St. 310, 41 Am. Rep. 500; *Little Rock, etc., Tel. Co. v. Davis*, 1 Am. Electl. Cas. 526, 41 Ark.

79, 8 Am. & Eng. Corp. Cas. 102; *Hart v. Western Union Tel. Co.*, 1 Am. Electl. Cas. 734, 66 Cal. 579, 8 Am. & Eng. Corp. Cas. 24, 56 Am. Rep. 119 (rule changed by Civil Code, §§ 2162, 2168); *Western Union Tel. Co. v. Hyer*, 2 Am. Electl. Cas. 484, 22 Fla. 637, 16 Am. Eng. Corp. Cas. 232, 1 Am. St. Rep. 222; *Central Union Teleph. Co. v. Bradbury*, 2 Am. Electl. Cas. 14, 106 Ind. 1; *Tyler v. Western Union Tel. Co.*, 1 Am. Electl. Cas. 14, 60 Ill. 421, 14 Am. Rep. 38; *Sweatland v. Illinois, etc., Tel. Co.*, 27 Iowa, 458, 1 Am. Rep. 285; *Aken v. Western Union Tel. Co.*, 2 Am. Electl. Cas. 566, 69 Iowa, 31, 13 Am. & Eng. Corp. Cas. 585, 58 Am. Rep. 210; *Camp v. Western Union Tel. Co.*, 1 Metc. (Ky.) 164, 71 Am. Dec. 461; *Fowler v. Western Union Tel.*

which have impelled the courts to adopt the rule that such companies should not be charged with the absolute liability of a

Co., 2 Am. Electl. Cas. 607, 80 Me. 381, 6 Am. St. Rep. 211; Bartlett v. Western Union Tel. Co., 1 Am. Electl. Cas. 45, 62 Me. 209, 16 Am. Rep. 437; Birney v. New York, etc., Tel. Co., 18 Md. 341, 81 Am. Dec. 607; Grinnell v. Western Union Tel. Co., 1 Am. Electl. Cas. 70, 113 Mass. 299, 18 Am. Rep. 485; Western Union Tel. Co. v. Carew, 15 Mich. 525; Wann v. Western Union Tel. Co., 37 Mo. 472, 90 Am. Dec. 395; New York, etc., Print. Tel. Co. v. Dryburg, 35 Pa. St. 298, 78 Am. Dec. 338; Passmore v. Western Union Tel. Co., 1 Am. Electl. Cas. 168, 78 Pac. St. 238; Aiken v. Western Union Tel. Co., 1 Am. Electl. Cas. 121, 5 S. C. 538; Western Union Tel. Co. v. Neill, 1 Am. Electl. Cas. 352, 57 Tex. 283, 44 Am. Rep. 589; Western Union Tel. Co. v. Edsall, 1 Am. Electl. Cas. 715, 63 Tex. 668, 8 Am. & Eng. Corp. Cas. 70; Washington, etc., Tel. Co. v. Hobson, 15 Gratt. (Va.) 122; Hibbard v. Western Union Tel. Co., 1 Am. Electl. Cas. 62, 33 Wis. 565; Candee v. Western Union Tel. Co., 1 Am. Electl. Cas. 99, 34 Wis. 471, 17 Am. Rep. 452; Abraham v. Western Union Tel. Co., 1 Am. Electl. Cas. 728, 23 Fed. Rep. 315, 8 Am. & Eng. Corp. Cas. 130, 11 Sawy. (U. S.) 28; Southern Express Co. v. Caldwell, 21 Wall. (U. S.) 269; Baxter v. Dominion Tel. Co., 37 U. C. Q. B. 470; Western Union Tel. Co. v. Reynolds, 1 Am. Electl. Cas. 487, 77 Va. 173, 46 Am. Rep. 715, 5 Am. & Eng. Corp. Cas. 182.

The transmission of messages is necessarily subject to the risk of mistake and interruption. The wire is

exposed to the interference of strangers; a surcharge of electricity in the atmosphere, or a failure of or an irregularity in the electrical current, may stop communication; and it is continually subject to danger from accident, malice, and climatic influence, when the company has not the actual immediate custody of the messages, as the common carrier has of the merchandise it carries; and it should not, therefore, like a common carrier, be treated not only as a bailee, but as an insurer. Smith v. Western Union Tel. Co., 1 Am. Electl. Cas. 743, 83 Ky. 104, 8 Am. & Eng. Corp. Cas. 20, 4 Am. St. Rep. 126. The nature of the business is suggestive of many risks and contingencies to which no other business or agency is subject. The electric current may be interrupted and the current broken without fault of the corporation, so as to obstruct telegraphic communication, and words of different signification may be represented by characters so similar that errors in transcribing may occur without fault on the part of the person transcribing it, or technical terms may be used not easily expressed by telegraphy, and in which errors may occur without fault. These and risks of the like character are upon the person sending the message, unless he elects to comply with the terms of the company, and have the dispatch repeated, by which certain risks are guarded against and errors prevented or insured against. But an error in transcribing the direction, and a consequent misdelivery, are *prima facie* evidence of neglect and want of care

common carrier are, in substance, as follows: That liability was founded upon the necessities of the case, real or fancied, and has never been applied to any person or any occupation, except those of carriers of goods and inn-keepers. The carrier had the exclusive possession and control of the goods, often in secret, away from the supervision of any other person, with opportunity for embezzlement and collusion with evil-minded persons, and without means of discovery by the owner, especially in the ruder stages of civilization, and before the present modes of communication, rapid and easy, were in existence. It was, upon this view, early adopted, as a rule of safety to the community, that the carrier should always be *prima facie* liable, in case of non-delivery of the goods, and that he should not be excused for any causes, except those occurring by the act of God or of the public enemies, and these were to be shown by himself. Whether its liability is based upon the contract it makes, or upon its public duty, the telegraph company does not come within any of these principles. Its liability for error or failure in the transmission of a dispatch is quite unlike that of a common carrier. A telegraph company is entrusted with nothing but an order or message, which is not to be carried in the form in which it is received, but is to be transmitted or repeated by electricity, and is peculiarly liable to mistake; which cannot be the subject of embezzlement; which is of no intrinsic value; the importance of which cannot be estimated except by the sender, nor ordinarily disclosed by him without the danger of defeating his own purposes; which may be wholly valueless, if not forwarded immediately; for the transmission of which there must be a simple rate of compensation; and the measure of damages for failure to transmit or deliver which has no relation to any value which can be put on the message itself.⁹³ On the other hand, the authorities which have

in the operator, and cast the burden upon the company of explaining the error and showing that it occurred without fault. This is upon the supposition that the message is received for transmission unconditionally. *Baldwin v. United States Tel. Co.*, 45 N. Y. 744, 751, 6 Am. Rep. 165.

93. *Leonard v. New York, etc., Tel. Co.*, 41 N. Y. 544, 1 Am. Rep. 446; *Grinnell v. Western Union Tel. Co.*, 1 Am. Elect. Cas. 70, 113 Mass. 299, 18 Am. Rep. 485; see also, cases cited note 92.

maintained that telegraph companies are common carriers and, therefore, liable as insurers, have urged the following reasons in support of their proposition: Such companies hold themselves out to the public as engaged in a particular branch of business, in which the interests of the public are deeply concerned. They propose to do a certain thing for a given price. There is no difference, in the general nature of the legal obligation of the contract, between carrying a message along a wire and carrying goods or a package along a route. The physical agency may be different, but the essential nature of the contract is the same. The breach of the contract, in the one case or in the other, is, or may be attended with the same consequences, and the obligation to perform the stipulated duty is the same in both cases. The importance of the discharge of it in both cases is the same. In both cases the contract is binding, and the responsibilities of the parties is governed by the same general rules.⁹⁴ The rule established by the latter cases has been changed by special statutory provisions in California and is not now accorded much weight elsewhere.⁹⁵ But, although telegraph companies are not liable as insurers, they are bound to transmit all proper messages with the care and diligence adequate to the business which they undertake, to serve the public in good faith, impartially and without discrimination, and, if they fail so to do, they become responsible for any losses occasioned by the neglect and omission of duty, or willful default, of their servants and agents.⁹⁶ Like common carriers, however, they cannot contract with their employers for exemption from liability for the consequences of their own neg-

94. *Parks v. Alta, etc., Tel. Co.*, 13 Cal. 422, 73 Am. Dec. 589; *Western Union Tel. Co. v. Fontaine*, 1 Am. Electl. Cas. 229, 58 Ga. 433; *Western Union Tel. Co. v. Meek*, 1 Am. Electl. Cas. 138, 49 Ind. 53; *Bowen v. Lake Erie Tel. Co. (Ohio)*, 1 Am. L. Reg. 685; *True v. International Tel. Co.*, 60 Me. 9, 11 Am. Rep. 156; *Bryant v. American Tel. Co.*, 1 Daly (N. Y.), 575; *Bell v. Dominion Tel. Co.*, 25 L. C. J. (Can.), 248; *MacAndrew v.*

Electric Tel. Co. (Eng.), 17 C. B. 3, 84 E. C. L. 3; *Gray on Telegraphs*, §§ 6, 7; *Shear. & Red. on Neg.* (4th ed.), § 554, *et seq.*; *Kirby v. Western Union Tel. Co.*, 6 Am. Electl. Cas. 824, 7 S. D. 623, 30 L. R. A. 621, 65 N. W. 37, telegraph companies are made common carriers by statute.

95. Cal. Civ. Code, §§ 2162, 2163; see cases cited note 92.

96. See cases cited note 92 under this section.

ligence or that of their servants.⁹⁷ They are responsible only

97. *Southern Express Co. v. Caldwell*, 21 Wall. (U. S.) 269; *White v. Western Union Tel. Co.*, 14 Fed. Rep. 710; *American Union Tel. Co. v. Daughtery*, 3 Am. Electl. Cas. 579, 89 Ala. 191; *Stiles v. Western Union Tel. Co.*, 2 Am. Electl. Cas. 471 (Ariz.), 15 Pac. 712; *Western Union Tel. Co. v. Short*, 3 Am. Electl. Cas. 592, 53 Ark. 434; *Western Union Tel. Co. v. Graham*, 1 Colo. 230, 9 Am. Rep. 136; *Western Union Tel. Co. v. Blanchard*, 1 Am. Electl. Cas. 404, 68 Ga. 299, 45 Am. Rep. 480; *Western Union Tel. Co. v. Fontaine*, 1 Am. Electl. Cas. 229, 58 Ga. 433; *Western Union Tel. Co. v. Meredith*, 1 Am. Electl. Cas. 643, 95 Ind. 93, 8 Am. Eng. Corp. Cas. 54; *Western Union Tel. Co. v. Adams*, 1 Am. Electl. Cas. 442, 87 Ind. 598, 44 Am. Rep. 776; *Western Union Tel. Co. v. Meek*, 1 Am. Electl. Cas. 138, 49 Ind. 53; *Western Union Tel. Co. v. Fenton*, 1 Am. Electl. Cas. 198, 52 Ind. 1; *Harkness v. Western Union Tel. Co.*, 2 Am. Electl. Cas. 571, 73 Iowa 190, 21 Am. & Eng. Corp. Cas. 182, 5 Am. St. Rep. 672; *Sweatland v. Illinois, etc., Tel. Co.*, 27 Iowa 433, 1 Am. Rep. 285; *Granville v. Western Union Tel. Co.*, 37 Iowa 214, 18 Am. Rep. 8; *Tyler v. Western Union Tel. Co.*, 1 Am. Electl. Cas. 14, 60 Ill. 421, 14 Am. Rep. 38; *Western Union Tel. Co. v. Tyler*, 74 Ill. 168, 24 Am. Rep. 279; *Smith v. Western Union Tel. Co.*, 1 Am. Electl. Cas. 743, 83 Ky. 104, 8 Am. & Eng. Corp. Cas. 15, 4 Am. St. Rep. 126; *Camp v. Western Union Tel. Co.*, 1 Metc. (Ky.) 164, 71 Am. Dec. 461; *De La Grange v. Southwestern Tel. Co.*, 1 Am. Electl. Cas. 59, 25 La. Ann. 383;

Bartlett v. Western Union Tel. Co., 1 Am. Electl. Cas. 45, 62 Me. 209, 16 Am. Rep. 437; *Ayer v. Western Union Tel. Co.*, 2 Am. Electl. Cas. 601, 79 Me. 493, 21 Am. & Eng. Corp. Cas. 145, 1 Am. St. Rep. 353; *Western Union Tel. Co. v. Griswold*, 37 Ohio St. 303, 41 Am. Rep. 500; *Marr v. Western Union Tel. Co.*, 2 Am. Electl. Cas. 720, 85 Tenn. 529, 16 Am. & Eng. Corp. Cas. 243; *Pepper v. Western Union Tel. Co.*, 2 Am. Electl. Cas. 756, 87 Tenn. 554, 25 Am. & Eng. Corp. Cas. 542, 10 Am. St. Rep. 699; *Western Union Tel. Co. v. Broesche*, 2 Am. Elect. Cas. 815, 72 Tex. 654, 13 Am. St. Rep. 843; *Wertz v. Western Union Tel. Co.*, 3 Am. Electl. Cas. 808, 7 Utah 446; *Gillis v. Western Union Tel. Co.*, 2 Am. Electl. Cas. 841, 61 Vt. 461, 25 Am. & Eng. Corp. Cas. 568, 15 Am. St. Rep. 917; *Thompson v. Western Union Tel. Co.*, 64 Wis. 531, 54 Am. Rep. 644; *Candee v. Western Union Tel. Co.*, 1 Am. Electl. Cas. 99, 34 Wis. 471, 17 Am. Rep. 452.

The reason of the rule.—“Courts and legislatures have been liberal in allowing telegraph companies to provide against such risks as arise out of atmospheric influences and kindred causes. At this point they have properly stopped. To permit them to contract against their own negligence would be to arm them with a most dangerous power, and indeed that would leave the public almost entirely remediless. It must be born in mind that the public have but little choice in the selection of the company which is to perform the desired service. They are bound to take it as they find it and to commit

for failure to exercise ordinary care and vigilance in the performance of their duties.⁹⁸ In New York and some of the other States telegraph companies have the right to make reasonable rules and regulations for the conduct of their business, and they can thus limit their liability for mistake, not occasioned by gross negligence or willful misconduct, and this they can do by notice brought home to the sender of the message, or by special contract entered into with him.⁹⁹ A telegraph company

to its agents their messages, however valuable. Such being the case, public policy as well as commercial necessity require that companies engaged in telegraphing should be held to a high degree of responsibility." *Western Union Tel. Co. v. Graham*, 1 Colo. 237, 9 Am. Rep. 136.

98. *Baldwin v. United States Tel. Co.*, 45 N. Y. 744, 6 Am. Rep. 165.

99. *Breese v. United States Tel. Co.*, 48 N. Y. 141, 8 Am. Rep. 526; *Mowry v. Western Union Tel. Co.*, 2 Am. Electl. Cas. 679, 51 Hun (N. Y.), 126, 4 N. Y. Supp. 666; *Pearsall v. Western Union Tel. Co.*, 3 Am. Electl. Cas. 724, 124 N. Y. 256, 21 Am. St. Rep. 662; *Nicholas v. New York Cent., etc., R. R. Co.*, 89 N. Y. 370; *Kenney v. New York Cent., etc., R. R. Co.*, 125 N. Y. 422; *Will v. Postal Tel. Cable Co.*, 6 Am. Electl. Cas. 807, 3 App. Div. (N. Y.), 22, 73 St. Rep. (N. Y.) 552, 37 N. Y. Supp. 933, 3 N. Y. Ann. Cas. 123; *Birney v. New York and Washington Tel. Co.*, 18 Md. 341, 81 Am. Dec. 607; *New York & Washington Printing Tel. Co. v. Dryburg*, 35 Pa. St. 298; *Ellis v. American Tel. Co.*, 13 Allen (Mass.), 226; *Western Union Tel. Co. v. Carew*, 15 Mich. 525; *Wann v. Western Union Tel. Co.*, 37 Mo. 472, 90 Am. Dec. 395; *Camp v. Western Union Tel. Co.*, 1 Metc.

(Ky.) 164; *McAndrew v. Electric Tel. Co.*, 33 Eng. L. & Eq. 180; *Lassiter v. Western Union Tel. Co.*, 89 N. C. 336, 5 Am. & Eng. Corp. Cas. 230; *Pegram v. Western Union Tel. Co.*, 97 N. C. 57, 21 Am. & Eng. Corp. Cas. 122; *Becker v. Western Union Tel. Co.*, 1 Am. Electl. Cas. 337, 11 Neb. 87, 37 Am. Rep. 356; *Grinnell v. Western Union Tel. Co.*, 1 Am. Electl. Cas. 70, 113 Mass. 299, 18 Am. Rep. 485; *Redpath v. Western Union Tel. Co.*, 1 Am. Electl. Cas. 40, 112 Mass. 71, 17 Am. Rep. 69; *United States Tel. Co. v. Gildersleeve*, 29 Md. 232, 96 Am. Dec. 519; *Hart v. Western Union Tel. Co.*, 1 Am. Electl. Cas. 734, 66 Cal. 579, 8 Am. & Eng. Corp. Cas. 24, 56 Am. Rep. 119; *White v. Western Union Tel. Co.*, 14 Fed. Rep. 710, 5 McCrary (U. S.), 103.

See also *Kemp v. Western Union Tel. Co.*, 3 Am. Electl. Cas. 711, 28 Neb. 661, 30 Am. & Eng. Corp. Cas. 607, holding that a statute of that state prohibiting exemption from liability by contract is reasonable, and binding on all companies in that State; *Western Union Tel. Co. v. Neill*, 1 Am. Electl. Cas. 352, 57 Tex. 283, 44 Am. Rep. 589; *Womack v. Western Union Tel. Co.*, 1 Am. Electl. Cas. 454, 58 Tex. 176, 44 Am. Rep. 614, holding that a stipulation

furnishing messengers for the delivery of packages, does not assume the liability of a common carrier, but only agrees that the messenger furnished shall be a suitable person for the work.^{99a} As we have already shown the courts have differed as to the legal status of telegraph and telephone companies.^{99b} For example, it was held that telegraph companies, in the absence of a statute making them such, are not common carriers.^{99c} It was held that whatever may have been the law heretofore, it is now generally held that telegraph companies are not common carriers; but nevertheless a telegraph company is not a mere private one for personal gain only, but the business in which it is engaged is for the benefit of, and used for the benefit of, the general public.^{99d} It was held that telegraph companies are not public carriers in the strict sense of the term, yet on account of the public nature of their employment they have in many cases been held to a very similar responsibility.^{99e} Later cases hold otherwise. For example: Telephone and telegraph companies are common carriers

against liability will not extend to injuries caused by "the misconduct, fraud, or want of due care on the part of the company, its servants or agents." *Western Union Tel. Co. v. Goodbar* (Miss.), 7 So. 214, holding the company liable for gross negligence, notwithstanding an exemption clause in the contract.

Fraud or bad faith.—Telegraph companies cannot relieve themselves by their regulations from liability for "fraud or any conduct inconsistent with good faith." *Schwartz v. Atlantic, etc., Tel. Co.*, 1 Am. Electl. Cas. 284, 18 Hun (N. Y.), 157; *Candee v. Western Union Tel. Co.*, 1 Am., Electl. Cas. 99, 34 Wis. 471, 17 Am. Rep. 452; *United States Tel. Co. v. Gildersleeve*, 29 Md. 232, 96 Am. Dec. 519; *Jones v. Western Union Tel. Co.*, 1 Am. Electl. Cas. 551, 18 Fed. Rep. 717; 3 Suth. on Dam. 296.

99a. *Murray v. Postal Telegraph*

& Cable Co., 210 Mass. 188, 96 N. E. 316.

99b. See cases cited in preceding notes to this section.

99c. *Birkett v. Western Union Telegraph Co.*, 103 Mich. 361, 61 N. W. 645, 33 L. R. A. 404, 50 Am. St. Rep. 374. (1894).

Under the Oklahoma statute, declaring a telegraph company to be a common carrier, such companies are to be treated in all respects as invested with those privileges and as bound by those obligations and restrictions placed around carriers. *Blackwell Milling & Elevator Co. v. Western Union Telegraph Co.*, 17 Okl. 376, 89 Pac. 235. (1907).

99d. *State ex rel National Subway Co. v. City of St. Louis*, 145 Mo. 551, 46 S. W. 981, 42 L. R. A. 113. (1898).

99e. *Western Union Telegraph Co. v. Reynolds*, 77 Va. 173, 46 Am. Rep. 715. (1883).

of news.^{99f} A telephone company is a common carrier of news, and affected with a public interest.^{99g} A telephone company is a common carrier of intelligence.^{99h} A telephone company is a common carrier of communications.⁹⁹ⁱ A telephone company is a common carrier of intelligence and news.^{99j} A telephone company is a public service corporation engaged in a public utility, and in receiving, transmitting, and delivering messages should be treated as an independent principal or contracting party, and be held liable both in contract and tort, the same as other principals.^{99k} A telephone company doing a general telephone business is a common carrier.^{99l} A telegraph company is a public service corporation.^{99m} The Interstate Commerce Act, section 1, as amended in 1910, provides that the provisions of that act shall apply to "telegraph, telephone, and cable companies (whether wire or wireless) engaged in sending messages from one State, Territory or District of the United States, to any other State, Territory, or District of the United States, or to any foreign country, who shall be considered and held to be common carriers within the meaning and purpose of this act," but provides that they shall not apply "to the transmission of messages by telephone, telegraph, or cable wholly within one State and not transmitted to or from a foreign country from or to any State or Territory as aforesaid."⁹⁹ⁿ

99f. *S. C.*—Gwynn v. Citizens' Telephone Co., 69 S. C. 434, 48 S. E. 460. (1904).

Tenn.—State v. Cumberland Telephone & Telegraph Co., 114 Tenn. 194, 86 S. W. 390. (1905).

99g. Mooreland Rural Telephone Co. v. Mouch, 48 Ind. App. 521, 96 N. E. 193 (1911).

99h. Brandon v. Cumberland Telephone & Telegraph Co., 146 Ky. 639, 143 S. W. 11. (1912.)

99i. Southwestern Telegraph & Telephone Co. v. Danaber (Ark.), 144 S. W. 925. (1912).

99j. Alt v. State, 88 Neb. 259, 129 N. W. 432. (1911).

99k. Strong v. Western Union Telegraph Co., 18 Idaho, 409, 109 Pac. 917 (1910).

99l. State v. Cadwallader, 172 Ind. 619, 87 N. E. 644, rehearing denied 89 N. E. 319. (1909).

99m. Dunn v. Western Union Telegraph Co., 2 Ga. App. 845, 59 S. E. 189; Jeffries v. Western Union Telegraph Co., 2 Ga. App. 853, 59 S. E. 192. (1907).

99n. Interstate Commerce Act § 1, as amended by Act June 18, 1910.

§ 38. Telephone companies.

Telephone companies do not offer to transmit messages, but merely furnish to subscribers the means of transmitting their own by word of mouth, and they have been held not to be common carriers.¹ But telephone companies, like telegraph companies, are analogous to common carriers in that they are bound to afford equal facilities to all, and may be compelled by mandamus to furnish facilities to one offering to comply with their regulations, even though such party is a rival company, and are responsible only for failure to exercise proper care.² A private corporation engaged in the business of operating a telephone plant is a common carrier of news and intelligence, within the scope of a statute providing for the regulation of the rates of common carriers.³ A telephone company doing a general telephone business is a common carrier of news and must furnish impartial service without discrimination to all persons in the same class.^{3a} The later cases hold a telephone company, like a telegraph company, to be a common carrier of news, intelligence, or communications.^{3b} The interstate Commerce Act, as amended by the Act, June 18, 1910,

1. *American Rapid Tel. Co. v. Connecticut Teleph. Co.*, 1 Am. Electl. Cas. 390, 49 Conn. 352, 1 Am. & Eng. Corp. Cas. 378, 44 Am. Rep. 237; *State v. Nebraska Teleph. Co.*, 1 Am. Electl. Cas. 700, 17 Neb. 126, 52 Am. Rep. 404, 8 Am. & Eng. Corp. Cas. 1. Cases have arisen where the parties, being unable to communicate directly with each other, have done so through the medium of an operator of an intermediate station, but the liability of the company in such cases was not adjudicated. *Sullivan v. Kuykendall*, 82 Ky. 483, 56 Am. Rep. 901; *Oskamp v. Gadsden*, 35 Neb. 7, 52 N. W. 718.

2. *Chesapeake, etc., Teleph. Co. v. Baltimore, etc., Tel. Co.*, 2 Am. Electl. Cas. 416, 66 Md. 399, 16 Am. & Eng. Corp. Cas. 219, 50 Am. Rep.

167; *State v. Nebraska Teleph. Co.*, *supra*; *Delaware v. Delaware, etc., Tel. Co.*, 3 Am. Electl. Cas. 533, 47 Fed. Rep. 633, 35 Am. & Eng. Corp. Cas. 15; *Central Union Teleph. Co. v. Bradbury*, 2 Am. Electl. Cas. 14, 106 Ind. 1; *People v. Manhattan Gas Light Co.*, 45 Barb. (N. Y.) 136; *Central Union Teleph. Co. v. State*, 3 Am. Electl. Cas. 529, 2 Am. Electl. Cas. 27, 123 Ind. 113, 118 Ind. 194, 10 Am. St. Rep. 113, 25 Am. & Eng. Corp. Cas. 481.

3. *Nebraska Teleph. Co. v. State*, *Yeiser*, 7 Am. Elect. Cas. 860, 55 Neb. 627, 76 N. W. 171, 45 L. R. A. 113.

3a. *State v. Cadwallader*, 172 Ind. 619, 87 N. E. 644, rehearing denied 89 N. E. 319 (1909).

3b. See cases cited in § 37, notes 99f-99k, *supra*.

makes a telephone company doing an interstate telephone business a common carrier within the meaning and purpose of that act.^{3c}

§ 39. Railroad company transporting a circus, menagerie, or show.

A railroad company is not a common or public carrier in respect to a special train of cars loaded with wild animals and other property, as well as persons, belonging to or connected with a circus, which is loaded and unloaded by the proprietor of the circus and is run on special time to suit his convenience, under a special contract that he shall assume all the risks of accidents, the only duty of the railroad company being to haul the cars.⁴ A common carrier's liability does not attach to a railroad company contracting to move a menagerie in the latter's own cars, controlled by its own agents, and, though operated by railroad employes, run upon a time schedule to suit the menagerie. And a stipulation that the company shall not be liable for injuries to the menagerie caused by want of care may be upheld.⁵ A railroad company is not required, as a common carrier, to take a circus train, a part of which is loaded with wild animals, and transport the same over its line, but may refuse to transport such train, ex-

3c. See Interstate Commerce Act, § 1; § 37, *supra*.

4. *Chicago, etc., R. Co. v. Wallace*, 66 Fed. 506, 24 U. S. App. 589. The court held that the defendant was not chargeable as a common carrier, since it did not hold itself out as a carrier of wild animals, etc., nor as carrying on special schedules or trains; that the defendant could only be charged upon the special contract, and that being valid, the stipulation against liability would preclude a recovery. *Robertson v. Old Colony R. Co.*, 156 Mass. 525, 31 N. E. 650, 32 Am. St. Rep. 482, a railroad company is not liable for injury to an employe of a circus, arising from a defect in a car truck which inspection would have revealed, when such

company is transporting a circus for a gross sum under a contract by which the proprietors of the circus agree to assume all risk of accident from any cause and save the company harmless. See also *Watson v. North British R. Co.*, 3 Ry. and C. T. Cas. 17.

5. *Coup v. Wabash, etc., Ry. Co.*, 56 Mich. 111, 56 Am. Rep. 374, 18 Am. & Eng. R. Cas. 542. The court, in this case, held that the railroad did not sustain the relation of common carrier, and was therefore entitled to stipulate against any liability whatever. At most, it was liable only for negligence. It did not profess, and was under no obligation, to undertake such transportation.

cept under a special contract limiting its liability to that assumed by a private carrier.⁶ A railroad corporation as a common carrier is under no legal duty to haul show cars, that is, cars owned and fitted up by showmen and used exclusively by them to house and transport their employes and show property as a complete outfit from place to place over railroads.^{6a} But where a railroad company, whose ordinary business is the transportation of property for hire, agreed with plaintiff to furnish the motive power to draw his cars, laden with his property, over its railroad, plaintiff being bound to load and unload the cars, and to furnish the brakemen to accompany them on the road, who were to be under the control of the railroad company's conductor, the company is liable as a common carrier for the injury to plaintiff's cars, and his property therein, not caused by inevitable accident, or the public enemies.^{6b}

§ 40. Railroad company in South Carolina liable only over its own line.

In South Carolina a railroad company, which is liable as a common carrier within the termini of its own line, is not liable as such beyond its own line and over connecting lines, unless it has assumed such liability by special contract, or become so by usage or the character of its business.⁷

§ 41. Railroad company carrying a dog for accommodation of passenger.

A railroad company which does not assume the transportation of dogs, but permits its baggage-masters to take charge of them as a matter of accommodation and for a fee retained by the baggage-master, is not liable as a common carrier, if the dogs come to harm.⁸ To the contrary, it has been held that, where a railroad

6. *Wilson v. Atlantic, etc., R. Co.*, 129 Fed. 774; *Sager v. North Pac. Ry. Co.*, 166 Fed. 536.

6a. *Cleveland, C. C. & St. L. Ry. Co. v. Henry*, 170 Ind. 94, 83 N. E. 710.

6b. *Mallory v. Tioga R. R. Co.*, 39 Barb. (N. Y.) 488.

7. *Piedmont Mfg. Co. v. Columbia,*

etc., R. Co., 19 S. C. 353, 16 Am. & Eng. R. R. Cas. 194.

8. *Honeyman v. Oregon & California R. R. Co.*, 13 Ore. 352, 57 Am. Rep. 20, 25 Am. & Eng. R. R. Cas. 380, wherein the court said: "The facts disclose that the defendant did not hold itself out as a common carrier of dogs, or assume their trans-

passenger, without special notice of the company's regulation that "live animals are allowed as baggagemen's perquisites," committed a dog to the baggage-master and paid him for its transportation, the company was liable for the loss of the dog by the baggage-man's delivering it to the wrong person.⁹ The loss of a dog by negligence of a baggage-master will render the carrier liable, although a rule of the company provided that it would not be responsible for dogs, where the owner was not notified of such rule or of the company's refusal to be responsible, but put the dog in the baggage car under instruction of the conductor.¹⁰ In an action for a breach of a contract for the special transportation of a crate containing five dogs, where the carrier receiving the dogs for shipment by a certain train shipped them by an earlier train, and, no one being present to receive them, returned them to the place of shipment, and the shipper, learning of the return, directed them to be reshipped on the next day, without in any way providing for them, the shipper was held not entitled to damages for the death of one of the dogs, resulting from his long confinement, the proximate cause of the death being the neglect of the shipper to have the dogs attended to before reshipment.¹¹ But the general rules of law respecting the obligations and liability of a carrier of

portation in that character, but that the defendant expressly refused to accept hire and furnish tickets for their transportation. The evidence shows that when the party having in charge the dogs applied to the ticket agent of the defendant for transportation for himself and dogs, the agent refused tickets for the dogs, and referred him to the baggage-master, who told him, 'You know the rules about dogs;' but, as an accommodation, consented to take the dogs in his car, and promised to look after them, for which he received two dollars. These circumstances do not show that it was the business of the defendant to carry dogs, or to receive pay for their transportation, but that, as a matter of accommoda-

tion to a passenger, it permitted the baggage-master, after the party was notified of the rules, to carry them in his car, and to accept pay for them."

9. *Cantling v. Hannibal, etc.*, R. R. Co., 54 Mo. 385, wherein it was shown that the company's rules and regulations were printed and posted at the various stations, but no special notice of this rule was brought home to the owner of the dog.

10. *Kansas City, etc., R. Co. v. Higdon*, 94 Ala. 286, 33 Am. St. Rep. 119, 52 Am. & Eng. R. Cas. 495.

11. *Harrison v. Weir*, 71 App. Div. (N. Y.) 248, 75 N. Y. Supp. 909, revg. 34 Misc. Rep. (N. Y.) 519, 69 N. Y. Supp. 957. See also 73 N. Y. Supp. 1119.

animals under an ordinary contract of carriage were not the subject of discussion in that case, as such questions did not arise. The rule which obtained at common law that there was no property in a dog, it being held to be *ferae naturae*, has been changed by statute and judicial construction, and recovery may now be had by the owner for a loss of or injury to a dog delivered to a carrier for transportation, and the rules governing the liability of the carrier are the same as apply to other classes of animals.¹² A conductor is justified in removing from a passenger car on his train a passenger, who, in defiance of a rule of the company against the carrying of dogs in passenger coaches, has a dog there which he refuses to remove on a request to do so by the conductor.¹³

§ 42. Carrier under a contract exempting "river risks."

Where the contract of a carrier for the United States, to transport certain goods to points in Montana, contained the clause: "No river risk on the part of the contractor for unavoidable accidents," and, while the goods were being transported up a river, they were burned with the steamer, it was held that the person so contracting was but a private carrier, whose liabilities were limited, and he was only bound to the exercise of ordinary care, and that loss by fire on board the steamer transporting the goods fell within the exemption from liability for loss by "river risks" incorporated in the contract.¹⁴

§ 43. Owners of passenger elevators.

The courts differ as to the exact status and character of the owners and operators of elevators used in public office buildings for the purpose of carrying the occupants of the buildings and the public from one floor to another as to the relations between them and their passengers, and as to the rule of liability applicable. In a recent New York case the court said: "Doubtless

12. *Winchell v. National Express Co.*, 64 Vt. 15, 55 Am. & Eng. R. Cas. 400, note; *Stuart v. Crawley*, 2 Stark. 323, 3 E. C. L. 428; *Dickson v. Great Northern R. Co.*, 18 Q. B. Div. 176, 28 Am. & Eng. R. Cas. 92; *Harrison v. London, etc., R. Co.*, 110

E. C. L. 122, 31 L. J. Q. B. 113; *Richardson v. Northeastern R. Co.*, L. R. 7 C. P. 75, 20 W. R. 461.

13. *Gregory v. Chicago, etc., R. Co.*, 100 Iowa, 345, 69 N. W. 532.

14. *United States v. Power*, 6 Mont. 271, 12 Pac. 639.

no distinction can be drawn between vertical transportation and horizontal transportation, or transportation along the surface of the earth. If the relationship between the parties and the character of the carrier are the same in both cases, there is no reason why the same measure of diligence should not be exacted in one case as in the other. But the defendant was not a common carrier, and received no compensation, at least directly, for carrying persons from one floor to another. The right of any person to be carried in the elevator was based on the implied invitation to enter, which the defendant as owner of the property is deemed to have extended to all who might have business on the premises." To such persons, the court held, the law imposed upon the occupant or owner of the premises the duty of reasonable prudence and care as to the machinery and appliances by which the elevator was moved, and in its maintenance and operation, the same general standard of care imposed upon the owners and occupants of real property. The court further held that an instruction that the same rule that is applicable to a railroad company, as to its road-bed, engine and machinery, that it is bound to exercise the utmost care and diligence and is liable for the slightest neglect against which human prudence and foresight might have guarded, is applicable to the owner of an elevator, was erroneous.¹⁵ The courts

15. *Griffen v. Manice*, 166 N. Y. 188, 59 N. E. 925, 52 L. R. A. 922, 82 Am. St. Rep. 630, revg. 47 App. Div. (N. Y.) 70, 62 N. Y. Supp. 364; *Griffen v. Manice*, 36 Misc. Rep. (N. Y.) 364, 73 N. Y. Supp. 559, affd. 74 App. Div. 371, 77 N. Y. Supp. 626 affd. 174 N. Y. 505, 66 N. E. 1109. See also *McGrell v. Buffalo Office Building Co.*, 153 N. Y. 265, 47 N. E. 305, revg. 90 Hun (N. Y.), 30, 35 N. Y. Supp. 599; *Hubener v. Heide*, 62 App. Div. (N. Y.) 368, 70 N. Y. Supp. 1115; *Grifhahn v. Kreizer*, 62 App. Div. (N. Y.) 414; *Tousey v. Roberts*, 114 N. Y. 312, 21 N. E. 399, 11 Am. St. Rep. 655.

Burden of proof.—The plaintiff in an action for injuries received by a

passenger through the defective working of an elevator has the burden of showing that the injury resulted from defendant's negligence. Where an elevator installed by a reputable firm has all the appliances known to stop the machinery when the car reaches the bottom of the shaft, even if the operator is remiss in his duties, and the machinery is in perfect order, as shown by various inspections by the person installing the elevator, insurance companies, and the city,—one inspection being made only a few hours before an accident occurring by reason of the unexpected failure of the machinery to so stop, though the car is properly operated,—there is no liability for



of Michigan, following this decision, have also held that the owner of a building having an elevator for passengers, in operating such elevator, is not "bound to exercise the highest degree of care and diligence of a cautious person so far as human care and foresight can go," but is only bound to use the care required of an ordinary prudent person under the circumstances.¹⁶ In Massachusetts it has been held that the owner of a passenger elevator for the use of tenants and others in a building, being under no obligation to carry passengers, is not a common carrier of passengers, within the meaning of a statute relating to the liabilities of common carriers of passengers, and hence is not liable for the death of a passenger caused by the elevator being out of repair.¹⁷ In Rhode Island it has been held that a landlord who maintains an elevator in his

the accident, though there has been an occasional bumping of the cars on the springs, which was shown not to be uncommon or to have been the cause of the accident. *Griffin v. Manice*, 36 Misc. Rep. 364, 73 N. Y. Supp. 559, 74 App. Div. (N. Y.) 371, 77 N. Y. Supp. 626, *affd.* 174 N. Y. 505, 66 N. E. 1109.

16. *Burgess v. Stowe*, 134 Mich. 204, 10 Detroit Leg. N. 434, 96 N. W. 29. Citing *Michigan Cent. R. Co. v. Coleman*, 28 Mich. 440; *Grand Rapids, etc., R. Co. v. Huntley*, 38 Mich. 537, 31 Am. Rep. 321; *Hall v. Murdock*, 114 Mich. 233, 72 N. W. 150.

17. *Seaver v. Bradley*, 179 Mass. 329, 69 N. E. 795, 88 Am. St. Rep. 384. See *Gibson v. International Trust Co.*, 186 Mass. 454, 72 N. E. 70; *Shattuck v. Rand*, 142 Mass. 83, 7 N. E. 43. In *Seaver v. Bradley*, *supra*, Holmes, C. J., said: "The modern liability of common carriers of goods is a resultant of the two long accepted doctrines that bailees were answerable for the loss of goods in their charge, although happening without their fault, unless it was due

to the public enemy, and that those exercising a common calling were bound to exercise it on demand and to show skill in their calling. Both doctrines have disappeared, although they have left this hybrid descendant. The law of common carriers of passengers, so far as peculiar to them, is a brother of the half blood. It also goes back to the old principles concerning common callings. Carriers not exercising a common calling as such are not common carriers. whatever their liabilities may be. But the defendant did not exercise the common calling of a carrier, as sufficiently appears from the fact that he might have shut the elevator door in the plaintiff's face and arbitrarily have refused to carry him without incurring any liability to him. Apart from that consideration, manifestly it would be contrary to the ordinary usages of English speech to describe by such words the maintaining of an elevator as an inducement to tenants to occupy rooms which the defendant wished to let."

private building for the use of tenants and their employes and customers is not a common carrier, nor bound to the same degree of care as that imposed upon a common carrier, but is bound only to exercise reasonable care for the safety of those who enter upon his premises and use the elevator.^{17a} In the Federal courts and the courts of some of the other States it has been held that persons operating elevators are carriers of passengers, the relation between them and their passengers being similar to that between an ordinary common carrier and those carried by it, and that they are subject to the same rules as to the degree of care required and the onus of proof in case of injury from defects in or the giving away of machinery as are applicable to common carriers of passengers. The degree of care required is variously stated to be the utmost human care and foresight, the highest degree of care, extraordinary care, and the highest degree of care and diligence practically consistent with the efficient use and operation of such modes of transportation.¹⁸ In Missouri it has been held that a company

17a. *Edwards v. Manufacturers' Bldg. Co.*, 27 R. I. 248, 61 Atl. 646. See *Blackwell v. O'Gorman*, 22 R. I. 638, 49 Atl. 28.

18. *U. S.*—*Mitchell v. Marker*, 62 Fed. 139, 22 U. S. App. 325, 10 C. C. A. 306, 25 L. R. A. 133.

D. C.—*Munsey v. Webb*, 37 App. D. C. 185.

Ala.—*Morgan v. Saks*, 38 So. 848 (Ala. 1905).

Cal.—*Treadwell v. Whittier*, 80 Cal. 574, 22 Pac. 266, 5 L. R. A. 498, 13 Am. St. Rep. 175.

Ill.—*Chicago Exchange Bldg. Co. v. Nelson*, 197 Ill. 334, 64 N. E. 369, affg. 98 Ill. App. 189; *Springer v. Schultz*, 205 Ill. 144, 68 N. E. 753, affg. 105 Ill. App. 544; *Deposit Co. v. Sollitt*, 172 Ill. 222, 50 N. E. 178; *Hodges v. Percival*, 132 Ill. 53, 23 N. E. 23; *Western Union Telegraph Co. v. Woods*, 88 Ill. App. 375; *An-*

derson Art Co. v. Greenburg, 118 Ill. App. 220.

Ind.—*Ohio Valley Trust Co. v. Wernke*, 84 N. E. 999 (Ind. App. 1908).

Ky.—*Hotel Co. v. Camp*, 97 Ky. 424, 30 S. W. 1010.

Minn.—*Goodsell v. Taylor*, 41 Minn. 207, 42 N. W. 873, 4 L. R. A. 673, 16 Am. St. Rep. 700.

Pa.—*Riland v. Hirshler*, 7 Pa. Super. Ct. 384.

Tex.—*Farmers' & Mechanics' Nat. Bank v. Hawks*, 128 S. W. 147 (Tex. Civ. App. 1910).

Tenn.—*Southern, etc., Ass'n v. Lawson*, 97 Tenn. 367, 37 S. W. 86, 56 Am. St. Rep. 804.

Wash.—*Perrault v. Emporium Department Store Co.*, 71 Wash. 523, 128 Pac. 1049; *Atkeson v. Jackson Estate*, — Wash. —, 130 Pac. 102.

Wis.—*Oberndorfer v. Pabst*, 100 Wis. 505, 76 N. W. 338.

operating an elevator in its office building for the use of tenants and their visitors is a common carrier of passengers for hire, and, though not an insurer of the safety of a passenger, must use such care, prudence, and caution to prevent injury to a passenger as a very careful and prudent person would use and exercise in a like business and under similar circumstances.¹⁹ And in Illinois the rule has been carried to the extent of holding that the owner of a building in which a freight elevator is operated, who permits an employe of his tenant to ride thereon in the discharge of his duties, occupies the relation of a common carrier of passengers for hire towards such employe, the hire received being the rent of the building, and is held to the highest degree of care to prevent injury to such employe.²⁰ And in Indiana it is held that the owner of an office building, or an apartment house, who maintains and operates therein a passenger elevator for the use of his tenants and the public who choose to use the same, is, as to those who ride in the elevator, a "common carrier of passengers" for hire.^{20a} Some of the cases maintain that this strict liability is more expedient and conforms better with the present needs of society. For although an elevator operator is not technically a common carrier, yet the considerations of public policy which require extraordinary diligence of the latter, would seem to require a similar degree of diligence of the former. In each case the passenger's safety depends wholly upon the operator's vigilance; in each case the probability of a serious accident, unless extraordinary vigilance is exercised, is imminent. The objection that an elevator operator receives no compensation for the carriage is met by the fact that he receives adequate compensation, indirectly at least, from the rent paid by the tenants. In Pennsylvania it has been held that where a city operates an elevator in a public building, the rule applicable to common carriers, that the happening of an accident to a pas-

19. *Mo.*—*Cooper v. Century Realty Co.*, 224 *Mo.* 709, 123 *S. W.* 848; *Goldsmith v. Holland Bldg. Co.*, 182 *Mo.* 597, 81 *S. W.* 1112; *Becker v. Lincoln Real Estate, etc., Co.*, 174 *Mo.* 246, 73 *S. W.* 581; *Lee v. Knapp*, 155 *Mo.* 610, 58 *S. W.* 458; *Hensler*

v. Stix, 88 *S. W.* 108 (*Mo. App.* 1905).

20. *Springer v. Ford*, 189 *Ill.* 430, 59 *N. E.* 953, 52 *L. R. A.* 930.

20a. *Ohio Valley Trust Co. v. Wernke*, 42 *Ind. App.* 326, 84 *N. E.* 999; *Tippecanoe Loan & Trust Co. v. Jester*, — *Ind. App.* —, 101 *N. E.* 915.

senger raises *prima facie* a presumption of negligence on the part of the carrier, applies.^{20b} In a recent New York case it was held that an unexplained drop of an elevator car of from twelve to fifteen inches, when a person enters it with a loaded truck, this being the ordinary use of the elevator, is such an unusual occurrence as requires the owner of the elevator to explain its cause, or that it was without his fault.^{20c}

§ 44. Car-switching companies. *

A railroad company in the general business of switching cars for all railroads which will furnish it business is a common carrier.²¹ But a belt line railway company, owning locomotives and one flat car and about fifteen miles of track, which makes connection with various railroad companies, and switches cars for these companies to stockyards and other railroad connections, but which has no depot or loading facilities, furnishes no cars, makes no charges to shippers or contract with them, and is paid for its services by the railroad companies, is not a common carrier.^{21a} So, the owner of a coal mine or a lumber mill who constructs and operates a railroad switch or spur for the purpose of getting his own products to market is not a common carrier.^{21b} A company whose principal business is switching cars for other railroad companies, its tracks being connected with those of the other railroads by a transfer switch, and with mills, elevators, and manufactories near where its business is transacted, will be held liable, as a common carrier, for the loss of a car taken, without orders of the owner, to a manufactory, to be loaded and then switched to the transfer track for shipment.²² So, a railroad com-

20b. Fox v. City of Philadelphia, 208 Pa. 127, 57 Atl. 356, 65 L. R. A. 214.

20c. Harris v. Guggenheim, 138 N. Y. Supp. 1037.

21. Peoria, etc., R. Co. v. United States Rolling-Stock Co., 28 Ill. App. 79; Kansas City Southern Ry. Co. v. Rosebrook-Josey Grain Co. — Tex. Civ. App. —, 114 S. W. 436.

21a. Texas & P. Ry. Co. v. Henson,

56 Tex. Civ. App. 468, 121 S. W. 1127.

21b. Straight Creek Mining Co. v. Straight Creek Coal & Coke Co., 135 Ky. 536, 122 S. W. 842; E. E. Taenzer Co. v. Chicago, R. I. & P. R. Co., 170 Fed. 240, 95 C. C. A. 435 (Tenn.).

22. Peoria, etc. R. Co. v. Chicago, etc., R. Co., 109 Ill. 135, 18 Am. & Eng. R. Cas. 506, 50 Am. Rep. 605. See also, § 14, *ante*.

pany which takes loaded cars from its connection with another railroad, and transfers them by a switch engine over a portion of its own track to a spur of its own, receiving its compensation from the connecting road, is liable as a common carrier for the safety of the goods transported, regardless of the distance from the place of receipt to that of delivery.²³ But a corporation which, being under no legal obligation to do so, voluntarily contracts to switch cars over its tracks, between two or more railways, for which service it collects a certain switching charge for switching the cars, loaded or empty, but charges no traffic rates on the freight transported or transferred in the cars in the performance of such service, assumes none of the responsibilities of a common carrier, but only those of a switchman.²⁴ The fact that a motor car for mail and passengers was run over a spur track belonging to a private carrier does not establish the fact that the spur was operated as a public carrier of freight.^{24a} A belt line, switching whole trains on its own line from a given station to stockyards is doing more than a mere switching business, and is a common carrier, amenable to rules governing common carriers, and must be held to the same diligence.^{24b} A railroad, which serves business houses located along a spur track by delivering to them cars of freight and cars to be freighted and shipped, is a common carrier with respect to the use it makes of the track, and is, as such, bound to treat the houses located along the track without discrimination, and cannot discontinue its service as to one and continue it as to others.^{24c}

§ 45. Companies engaged in supplying messenger service.

A corporation incorporated as a telegraph company, which in addition to its telegraph service maintains a staff of messenger boys which it furnishes to its patrons and others needing their service, for which a charge is made based upon the time employed,

23. *Missouri Pac. R. Co. v. Wichita, etc., Grocery Co.*, 55 Kans. 225, 40 Pac. 899.

24. *Kentucky & I. Bridge Co. v. Louisville & N. R. Co.*, 37 Fed. 567, 2 L. R. A. 289, 2 Inters. Com. R. 351.

24a. *Edgar Lumber Co. v. Cornie*

Stave Co., 95 Ark. 449, 130 S. W. 452.

24b. *Fleming v. Kansas City S. B. R. Co.*, 89 Mo. App. 129.

24c. *W. C. Agee & Co. v. Louisville & N. R. Co.*, 142 Ala. 344, 37 So. 680.

is not a common carrier as to the services rendered by the messengers.²⁵ Where a messenger company had installed call boxes in

25. *Hirsch v. American Dist. Telegraph Co.*, 112 App. Div. (N. Y.) 265, 98 N. Y. Supp. 371, revg. 48 Misc. (N. Y.) 370, 95 N. Y. Supp. 562, wherein it was also held that the facts that plaintiff told the manager of one of the company's offices that he wanted a boy, and accepted one who was offered to him, and delivered to the boy a package, with instructions to deliver it at a certain place, did not show a contract between the plaintiff and the company for the delivery of the package, rendering it liable on failure of the boy to deliver the package. *Murray v. Postal Telegraph & Cable Co.*, 210 Mass. 188, 96 N. E. 316.

It had been previously held in New York that a company which furnishes messages to any who may desire them is a common carrier, and is liable as such for any property which is entrusted to its messengers to deliver. *Sandford v. American Dist. Telegraph Co.*, 6 Misc. (N. Y.) 534, 58 St. Rep. (N. Y.) 16, 27 N. Y. Supp. 142, 31 Abb. N. C. (N. Y.) 147; 13 Misc. Rep. (N. Y.) 88, 34 N. Y. Supp. 144, 68 St. Rep. (N. Y.) 191. The court below held that the messenger was the agent of the company for the services required and that the company was bound by this act. Although the judgment was reversed by the appellate court on the ground of a variance between the pleadings and the proof, the latter court expressed the opinion that, in a proper form of action and under the facts as they were proven, the defendant would have been liable as a common carrier; that the evidence

was sufficient to support an action *ex delicto*, but not an action *ex contractu*.

It had also been previously held that a telegraph messenger company whose business includes the delivery of parcels by its messengers for those who choose to employ it, is liable for any loss sustained by the employer which resulted from a messenger's disregard of the instructions given to him. *Feiber v. Manhattan Dist. Telegraph Co.*, 3 N. Y. Supp. 116, 20 St. Rep. (N. Y.) 95, 22 Abb. N. C. (N. Y.) 121, affg. 21 Abb. N. C. (N. Y.) 11; reargument denied, 4 N. Y. Supp. 555, 23 St. Rep. (N. Y.) 57.

Liable for damages where horse in charge of messenger ran away.—The plaintiffs hired a buggy and horses, and, on returning, stopped at the office of the District Telegraph Company and asked for a boy who could drive the horses back to the livery stable. A boy was sent out who took charge of the horses, but owing to his negligence or incompetence, the horses ran away while he was driving them, and injured themselves and the vehicle. In an action to recover damages therefor, it was held that the company was liable for the damages thus occasioned, and that the plaintiffs, although they were merely bailees for hire as to the horses and buggy, could maintain the action to recover such damages. *American Dist. Tel. Co. v. Walker*, 72 Md. 454, 20 Am. St. Rep. 479, 35 Am. & Eng. Corp. Cas. 91.

See, also, *Newton v. Pope*, 1 Cow. (N. Y.) 109, holding that one hired

houses, and was engaged in the carriage of small hand packages by means of messenger boys sent in response to calls, for hire, and a package containing money was intrusted to one of its messengers sent in response to a call, without giving notice of the character or contents of the package, the company was not liable as a common carrier for the loss of the package.²⁶ The knowledge of a messenger company that messengers sent out by it were sometimes employed to carry money does not render the company a common carrier, where the company exercises no control over the messenger during his employment by a patron.^{26a} As to messages sent by companies of this kind, they are under the same liability as telegraph companies, and are responsible, not as common carriers, but only for such losses as result from their negligence, or the negligence of their servants.²⁷ Although they are in a certain sense and to a certain extent common carriers, must serve impartially all who require their services, are liable on proof of negligence, and under some circumstances, and always by special contract, they may make themselves insurers, if such a carrier does not customarily transport money, it will not be liable in the absence of notice for the loss of money contained in an envelope delivered to a messenger in its employ.^{27a}

to drive horses, in whose hands they are injured, is only responsible for negligence, unskillfulness, or willful misconduct; the burden of proving which is on the hirer; *Harker v. Dement*, 9 Gill (Md.), 13, 52 Am. Dec. 670; *Brind v. Dale*, 2 M. & Rob. 80, 8 C. & P. 207, 34 E. C. L. 355; *Searle v. Laverick*, L. R. 9 Q. B. 122.

26. *Gilman v. Postal Telegraph Co.*, 48 Misc. Rep. (N. Y.) 372, 95 N. Y. Supp. 564, where plaintiff, before delivering a package of bank bills to a messenger of the defendant company, called into his service, so wrapped the bills in a newspaper as to conceal the character of the package and to create an impression that it was comparatively valueless, and no notice was given to the defendant, through its messenger or otherwise,

that the package contained money, and no special contract was made as to its carriage.

26a. *Haskell v. Boston Dist. Messenger Co.*, 190 Mass. 189, 76 N. E. 215, 2 L. R. A. (N. S.) 1091, 112 Am. St. Rep. 324 (1906), where a bill for rent was intrusted to a messenger furnished by a messenger company, and the amount collected by the messenger, the company did not become a common carrier and insurer of the bill and the money.

27. See *Telegraph Companies*, § 37, *ante*. *White v. Postal Telegraph & Cable Co.*, 25 App. Cas. (D. C.) 364, 33 Wash. L. Rep. 295, 4 A. & E. Ann. Cas. 767.

27a. *White v. Postal Telegraph & Cable Co.*, *supra*.

§ 46. Carriers of money and bank-bills.

A common carrier engaged in transporting goods, wares, and merchandise does not thereby hold himself out as a common carrier of gold and bank-bills.^{27b} The weight of authority is in favor of the proposition that there is no presumption that an ordinary carrier, a common carrier engaged in the transportation of goods, wares, and merchandise, assumes to act as a common carrier in respect to the transportation of money, and that the assumption of such liability must be proven by one who would hold the carrier responsible.^{27c} In the absence of evidence, the carriage of money was held not to be, strictly speaking, in the line of duty of a carrier holding itself out only as a carrier of goods, wares, and merchandise, for the reason that money, bank-bills, notes, checks, etc., do not come within the description of goods, wares, and merchandise as applied to carriers.^{27d} A

27b. *Citizens Bank v. Nantucket Steamboat Co.*, 2 Story (U. S.), 16; *Lee v. Burgess*, 9 Bush (Ky.), 652.

It must be clearly proved that they had held themselves out to the public as common carriers of bank-bills for hire, and that they had authorized the master to contract on their account, and not on his own, for the carriage thereof. *Citizens Bank v. Nantucket Steamboat Co.*, *supra*. The liability of the carrier for loss of bank-bills will depend upon the fact whether or not he received the bills to carry for compensation. *Kirtland v. Montgomery*, 1 Swan (Tenn.), 452.

27c. *U. S.*—*Kuter v. Michigan Cent. R. Co.*, 1 Biss. (U. S.) 35, 14 Fed. Cas. No. 7,955, 1 Pittsb. Leg. J. (Pa.) 30, 10 West. L. J. 416, a clause in the charter of a railroad company, requiring it to transport "all merchandise and property," does not oblige it to become a common carrier of money.

D. C.—*White v. Postal Telegraph & Cable Co.*, 25 App. Cas. (D. C.)

364, 33 Wash. L. Rep. 295, 4 A. & E. Ann. Cas. 767.

Ill.—*Chicago & A. R. Co. v. Thompson*, 19 Ill. 578.

Ky.—*Chesapeake & O. R. Co. v. Hall*, 136 Ky. 379, 124 S. W. 372.

La.—*Sulakowski v. Flint*, 22 La. Ann. 6, the carrier is liable on proof that it received specie as freight to be transported and delivered.

N. Y.—*Sewall v. Allen*, 6 Wend. 335, *revg. Allen v. Sewall*, 2 Wend. 327; *Gilman v. Postal Telegraph Co.*, 48 Misc. Rep. 372, 95 N. Y. Supp. 564.

Eng.—*Butler v. Basing*, 26 C. & P. 613, 12 E. C. L. 764.

27d. *White v. Postal Telegraph & Cable Co.*, *supra*; *Citizens Bank v. Nantucket Steamboat Co.*, 2 Story (U. S.), 16; *Chicago, etc., R. Co. v. Thompson*, 19 Ill. 578, carriers are not responsible for loss of bank-bills contained in baggage, unless this is specially disclosed to them; they are never common carriers of bank-bills, for that these are not goods and cha-

carrier may be a common carrier of money, as well as of other property, but it must be shown that the carrier made the carriage of money a part of its ordinary or general business,^{27e} or that it was its general custom or usage to receive and transport packages of money or bank-bills for hire,^{27f} or that it became such a carrier

tels, with regard to them, for which they are responsible; *Lee v. Burgess*, 9 Bush (Ky.), 652, while money and bank-bills are goods in a certain sense and for certain purposes, they are not ordinarily so considered; *Farmers', etc., Bank v. Champlain Transp. Co.*, 23 Vt. 186, 18 Vt. 131, 16 Vt. 52.

27e. *Kemp v. Coughtry*, 11 Johns. (N. Y.) 107; *Sewall v. Allen*, 6 Wend. (N. Y.) 335, revg. *Allen v. Sewall*, 2 Wend. (N. Y.) 327; *Gilman v. Postal Telegraph Co.*, 48 Misc. Rep. (N. Y.) 372, 95 N. Y. Supp. 564; *Sandford v. American Dist. Telegraph Co.*, 13 Misc. Rep. (N. Y.) 88, 34 N. Y. Supp. 144; 6 Misc. Rep. (N. Y.) 534, 27 N. Y. Supp. 142.

An express company offering to carry money for hire is a common carrier thereof, under South Dakota Rev. Civ. Code 1903, § 1577, providing that every one who offers to carry persons, property, or messages is a common carrier of whatever he thus offers to carry. *Platt v. Lecocq*, 150 Fed. 391 (U. S. C. C., S. D., 1906).

See, also, *Express Companies*, chap. II, § 9, *ante*.

27f. *Ala.*—*Garey v. Meagher*, 33 Ala. 630, the owners of a steamboat are responsible as common carriers for the loss of a cash letter delivered to the clerk, if the jury find that it is the general custom of steamboats to carry such letters, although they are delivered to the clerk and carried without charge; *Hosea v. McCrary*, 12 Ala. 349, a delivery to the clerk

is a delivery to the master for the purpose of charging him, if the general usage of boats to take charge of such letters is shown; *Knox v. Rives*, 14 Ala. 249, it is proper to leave to the jury the question of fact, whether cash letters belonged to that class or character of goods which the boat undertook to carry for hire.

Ind.—*Cincinnati, etc., Mail Line Co. v. Boal*, 15 Ind. 345, the usage must be such as had grown up with the consent of the carrier; a mere accommodation usage is not sufficient.

Ky.—*Robertson v. Kennedy*, 2 Dana (Ky.) 430.

Mass.—*Dwight v. Brewster*, 1 Pick. (Mass.) 50, 11 Am. Dec. 133.

Mo.—*Chouteau v. Steamboat St. Anthony*, 16 Mo. 216, it must be its usage to carry bills for hire, or the known usage of the trade that it should carry them; *Chouteau v. Steamboat St. Anthony*, 20 Mo. 519, affg. 16 Mo. 216, proof of a custom by boats to carry money for customers does not establish a custom for hire; *Whitmore v. Steamboat Caroline*, 20 Mo. 513, owners not liable for moneys intrusted to a clerk by a passenger, unless a known and established usage for a steamboat to carry money for hire, on account of the owners, is shown.

N. H.—*Elkins v. Boston, etc., R. Co.*, 23 N. H. (3 Fost.) 275, evidence that, twice in two years, a railroad company had carried goods in passenger trains, does not tend to prove

by reason of a special contract.^{27g} In order to make a carrier liable as a common carrier of money notice should be given that the package contains money, if the carrier does not customarily transport money for hire.^{27h} But if the general custom or usage of the carrier be established by the proofs, the carrier will be liable as an insurer for losses occurring otherwise than through the excepted risks.²⁷ⁱ The carrier will not be liable as an insurer, however, if the transportation be not for hire. In such a case the carrier is a mere mandatary or gratuitous bailee, liable for loss only by reason of its gross negligence.^{27j} The carrier's duty to inquire as to the value of property offered for transportation, the shipper's duty to state the character and value of the goods, and the effect of fraudulent concealment or misrepresentation of the character or value of the shipment are discussed in a subsequent chapter.^{27k}

§ 47. An irrigation company.

An irrigation company which appropriates the water of a public stream, and supplies the same, under contracts, to landowners who

that they intended to hold themselves out as common carriers of goods on passenger trains.

N. Y.—*Sewall v. Allen*, 6 Wend. (N. Y.) 337, carrier held not liable where it was the usage of persons sending money to compensate the master of the boat, who had been forbidden to carry money.

Vt.—*Farmers', etc., Bank v. Champlain Transp. Co.*, 23 Vt. 186, 56 Am. Dec. 68, the carrier suffering the captain to continue to carry bank-bills ought not to be regarded as fixing its responsibility, although the captain was permitted to take the perquisites.

^{27g}. *Powell v. Mills*, 30 Miss. 231, 64 Am. Dec. 158.

^{27h}. *Gilman v. Postal Telegraph Co.*, 48 Misc. Rep. (N. Y.) 372, 95 N. Y. Supp. 564; *White v. Postal*

Telegraph & Cable Co., 25 App. Cas. (D. C.) 364, 4 A. & E. Ann. Cas. 767; *Chicago, etc., R. Co. v. Thompson*, 19 Ill. 578; *Hayes v. Wells*, 23 Cal. 185; *American Dist. Telegraph Co. v. Walker*, 72 Md. 454, 20 Am. St. Rep. 479, 20 Atl. 1.

²⁷ⁱ *Dwight v. Brewster*, 1 Pick. (Mass.) 50; *Harrington v. McShane*, 2 Watts (Pa.), 443; *Kirtland v. Montgomery*, 1 Swan (Tenn.), 452; *Farmers', etc., Bank v. Champlain Transp. Co.*, 23 Vt. 186, 18 Vt. 131, 16 Vt. 52.

^{27j}. *Haynie v. Waring*, 29 Ala. 263; *Lee v. Burgess*, 9 Bush (Ky.), 652; *Mechanics', etc., Bank v. Gordon*, 5 La. Ann. 696; *Chouteau v. Steamboat St. Anthony*, 20 Mo. 519, affg. 16 Mo. 216. But see *Kemp v. Coughtry*, 11 Johns. (N. Y.) 107.

^{27k}. See chap. X, §§ 36, 37, 38, *post*.

had no prior rights in the waters of such stream, is not a common carrier. Such a company, appropriating the water of a natural stream and directing it to a beneficial use, becomes the proprietor of the water, and as such has the right to sell, transfer and deliver it; and such right can only be defeated by a subsequent failure to apply it to a beneficial use.²⁸ A canal company, contracting to furnish rice farmers a sufficient supply of water to irrigate their lands during the planting season, is not liable for damages resulting from an insufficient supply, where such insufficiency is attributable to the inadequacy of the fall of rain, from which source the canal is supplied.²⁹ A water company, being a public service corporation, and engaged in supplying for domestic, irrigating, and other purposes water appropriated under the laws of California, contracted to furnish a certain amount of water, "subject to such reasonable general rules and regulations" as it might adopt. The contract provided that if the company's supply of water was shortened by act of God, drought, etc., the lands to which the water was attached should be entitled "to only such water as can be supplied . . . after the full supply shall have been furnished to all cities and towns" dependent on the company for water, and the company "shall not be responsible for any deficiency of water occasioned by any of the above causes." It was held that the consumer was subject, in time of drought, to an apportionment of water among all consumers, and he was not entitled to his full quota as soon as cities and towns were supplied.³⁰ Under the Constitution of Idaho, which declares the use of all waters appropriated for sale, rental, or distribution to be a public use, and the right to collect compensation therefor a franchise, which cannot be exercised except by authority of, and in the manner prescribed by law, and which authorizes the legislature to provide, as it has done, for the fixing of maximum rates to be charged for water so sold, an irrigation company appropriating

28. *Wyatt v. Larimer & W. Irrig. Co.*, 1 Colo. App. 480, 29 Pac. 906.

29. *Landers v. Garland Canal Co.*, 52 La. Ann. 1465, 27 So. 727. See, also, *Carr v. Miller-Morris Canal, Irrig., etc., Co.*, 105 La. 239, 29 So.

715. *Compare Canal Co. v. Jenkins*, 1 Colo. App. 425, 20 Pac. 381.

30. *Souther v. San Diego Flume Co.*, 121 Fed. 347, 57 C. C. A. 561, affg. *San Diego Flume Co. v. Souther*, 112 Fed. 228.

water for sale has no authority to make a distinction between its consumers, and, while supplying some with water under private contracts at low rates, attack the validity of maximum rates fixed by the county commissioners under the statute, on the ground that, as applied to its other consumers, they will not yield a reasonable return on its investment, but will amount to a taking of its property without compensation. In determining the reasonableness of such rates, they must be considered as applicable to all its consumers.³¹ A person having a contract with an irrigation company, binding it to furnish water for the irrigation of his lands, has an adequate remedy at law for the company's refusal to comply with the contract, though it be conceded that the company is a common carrier of water, and mandamus does not lie to compel it to comply with the contract, under a statute providing that the writ of mandate will issue where there is not an adequate remedy at law.^{31a}

§ 48. Transfer companies.

Transfer companies engaged in the business of transferring baggage or freight to and from railroad or steamship depots, or between different parts of towns and cities, are common carriers, and responsible for the safe keeping and delivery of such baggage and freight.³² A transfer company transferring freight from one connecting line to another, or from the depot of the last of several connecting carriers to the consignee, is not "a connecting carrier," but merely the agent of one of the connecting lines, or of the consignee.³³ New York Laws, 1907, c. 429, § 38, relating to the

31. *Boise City Irrig., etc., Co. v. Clark*, 131 Fed. 415.

31a. *State v. Washington Irr. Co.*, 41 Wash. 283, 83 Pac. 308, 111 Am. St. Rep. 1019.

32. *DaPonte v. New Orleans Transfer Co.*, 42 La. Ann. 696, 7 So. 608; *Richards v. Westcott*, 2 Bosw. (N. Y.) 589; *Verner v. Sweitzer*, 32 Pa. St. 298. The liability as a common carrier may be implied from the custom of the carrier, but may be qualified by express contract or general

notice, the onus of proving the qualification being on the party setting it up. Proof of general notice of limitation of liability must be such as amounts to actual notice. Emblazoning the general object on a check, ticket, or notice, in large letters, but stating the restrictions in small ones, is insufficient. But the effect of such notice is no more than to render the bailees private carriers for hire. *Verner v. Sweitzer*, *supra*.

33. *Nanson v. Jacob*, 12 Mo. App.

liability of common carriers for the loss of baggage, applies only to the liability of a carrier for belongings, which are commonly known as "baggage" or "luggage," of a person to whom the carrier has furnished a ticket as an undertaking that it will carry both that person as its passenger and also a certain amount of the passenger's baggage, and does not apply to a transfer company, undertaking to transport a trunk from a train to the passenger's address.^{33a}

§ 49. Owners of grain elevators.

The business of elevating grain is a business charged with a public interest, and those who carry it on occupy a relation to the community analogous to that of common carriers, and may be controlled by public legislation for the common good.³⁴ The owners of grain elevators are subject to statutory regulation requiring them to receive and store grain offered at lawful prices when there is room for it although the main purpose in maintaining the elevator is to store their own grain in carrying on their business of buying and shipping grain, which may be obstructed by accepting the grain offered for storage.³⁵ Statutes regulating the fees for elevating, storing, and discharging grain by elevators and establishing the maximum charges which may be imposed, are not inconsistent with the Constitution of the United States, either as infringing the power to regulate commerce, or as involving a preference of the ports of one State over another, or as depriving any person of the equal protection of the laws, or of his property without due process of law.³⁶

125, *affd.* 93 Mo. 331, 32 Am. & Eng. R. Cas. 553.

33a. *Meister v. Woolverton*, 121 N. Y. Supp. 606, 67 Misc. Rep. (N. Y.) 167; *Morgan v. Woolverton*, 120 N. Y. Supp. 1008. See *Richardson v. Woolverton*, 117 N. Y. Supp. 908.

See also § 28, *supra*, and cases there cited.

34. *Budd v. New York*, 143 U. S. 517, 36 L. Ed. 247, 45 Alb. J. L. 354, 36 Am. & Eng. Corp. Cas. 31, 12 Sup.

Ct. Rep. 468, 5 Am. Ry. & Corp. Rep. 610.

35. *Brass v. North Dakota*, 153 U. S. 391, 38 L. Ed. 757, 14 Sup. Ct. Rep. 857.

36. *Budd v. New York*, *supra*; *Munn v. Illinois*, 94 U. S. 113; *Chicago, etc., R. Co. v. Iowa*, 94 U. S. 155.

The legislature can fix a maximum beyond which any charge would be unreasonable for the use of property

§ 50. Storage and transfer companies.—Public moving van companies.

A storage company, employed to move household effects from one house in a city to another, is not a common carrier having a lien on the property moved entitling it to retain it until its charges are paid.³⁷ It is liable only as a bailee for hire for the negligence of its servants.³⁸ A transfer and storage company engaged in a business of warehousing goods and forwarding them for a compensation in car load lots is a common carrier, so as to make it liable as such for the destruction of the goods while in its warehouse.³⁹ Public moving van companies, draymen, and truckmen engaged in transporting goods and merchandise are common carriers and subject to reasonable regulation as such.⁴⁰

in which the public has an interest, but cannot compel the doing of services without reward. *Budd v. New York*, 143 U. S. 517, 36 L. Ed. 247, 45 Alb. L. J. 354, 36 Am. & Eng. Corp. Cas. 31, 12 Sup. Ct. Rep. 468, 5 Am. Ry. & Corp. Rep. 610.

37. *Thompson v. New York Storage Co.*, 97 Mo. App. 135, 70 S. W. 938.

38. *Jamiet v. American Storage & Moving Co.*, 109 Mo. App. 257, 84 S. W. 128.

39. *Kettenhofen v. Globe Transfer & Storage Co.*, 70 Wash. 645, 127 Pac. 295.

40. *Lawson v. Connolly*, — Mich. —, 141 N. W. 623.

CHAPTER III.

CARRIERS OF GOODS.—DUTIES AND LIABILITIES.

- SECTION**
1. Carriers of goods.
 2. Duty of carrier to receive and carry.
 3. Must haul cars and freight of other carriers.
 4. May be compelled by mandamus.
 5. When failure or refusal to carry is legally excusable.
 6. May demand prepayment of charges.
 7. When carrier may select mode of transportation.
 8. Duty to furnish shipper facilities for transportation.
 9. Failure or refusal to furnish facilities for transportation.
 10. Special contracts for means of transportation.
 11. Duty to furnish facilities declared by statute.
 12. Must furnish suitable and safe cars.
 13. Tender of goods by shipper.
 14. Illegal purpose of shipper as a defense.
 15. Proximate cause of loss or injury.
 16. Discrimination in charges or facilities.
 17. The rule does not require the same rates and facilities for all.
 18. The compensation of the carrier.
 19. Excessive charges and actions therefor.
 20. Injunctions.

§ 1. Carriers of goods.

Carriers of goods are common carriers¹ whose rights, duties, obligations, and liabilities in the transportation of property delivered to them for carriage will be the subject of consideration in this and the following chapters under this general heading or subdivision. As here used, the term, carriers of goods, includes all common carriers, except carriers of passengers and carriers of live stock. The rules and principles applicable to carriers of goods and carriers of live stock being practically the same, in so far as their duties and liabilities are concerned, except that such rules and principles are modified in their application as to carriers of live stock so as to relieve them from liability for losses resulting from the inherent nature of the property carried, are

1. See the title Common Carriers.

treated without distinction in this connection. The essentials wherein the difference in liability consists will be set forth under the heading or subdivision, Carriers of Live Stock.²

§ 2. Duty of carrier to receive and carry.

It is the common-law duty of a common carrier, on being tendered a reasonable compensation, to receive at reasonable times and carry all goods offered to it for transportation, within the line of its business or of the kind which it undertakes to transport.³ Having room or the facilities for transporting the goods, and holding itself out to the public as ready and willing to carry goods for all

2. See the title Carriers of Live Stock.

3. *N. Y.*—*Cole v. Goodwin*, 19 *Wend.* (N. Y.) 251; *Fish v. Clark*, 2 *Lans.* (N. Y.) 176.

U. S.—*Platt v. Lecocq*, 158 *Fed.* 723, 85 *C. C. A.* 621, 15 *L. R. A.* (N. S.) 558; *New Jersey Steam Nav. Co. v. Merchants' Bank*, 6 *How.* (U. S.) 344; *Southern Express Co. v. St. Louis, etc., R. Co.*, 5 *Myers Fed. Dec.* § 1511; *Standard Line & Stone Co. v. Cumberland Valley R. Co.*, 15 *I. C. C. Rep.* 622, citing *Moore on Carriers*, 1st Ed., p. 92.

Ala.—*Atlantic Coast Line R. Co. v. Rice*, 169 *Ala.* 265, 52 *So.* 918.

Cal.—*Pfister v. Central P. R. Co.*, 70 *Cal.* 169, 59 *Am. Rep.* 404.

Conn.—*Merriam v. Hartford, etc., R. Co.*, 20 *Conn.* 354, 52 *Am. Dec.* 344.

Ga.—*Shellnut v. Central of Ga. R. Co.*, 131 *Ga.* 404, 62 *S. E.* 294, 18 *L. R. A.* (N. S.) 494; *Southern Express Co. v. R. M. Rose Co.*, 124 *Ga.* 581, 53 *S. E.* 185, upon compliance with such reasonable regulations as it may adopt for its own safety and the benefit of the public. *Atlanta, etc., R. Co. v. Holcombe*, 76 *Ga.* 590.

Under Georgia Civ. Code, 1895, § 2278, providing that a common carrier is bound to receive all goods offered that he is able and accustomed to carry on compliance with such reasonable regulations as he may adopt for his own safety and the benefit of the public, a carrier is bound to receive ordinary merchandise for transportation with the full measure of liability and at reasonable rates on demand, and in case of its refusal so to do the shipper has a remedy in damages. *Inman & Co. v. Seaboard Air Line Ry. Co.*, 159 *Fed.* 960.

Ky.—*Bedford-Bowling Green Stone Co. v. Oman*, 24 *Ky. Law Rep.* 2274, 73 *S. W.* 1038; *Seasongood v. Tennessee & O. Transp. Co.* (Ky.), 54 *S. W.* 193.

Ill.—*Peoria, etc., R. Co. v. Chicago, etc., R. Co.*, 109 *Ill.* 135, 50 *Am. Rep.* 605, 18 *Am. & Eng. R. Cas.* 506; *Galena R. Co. v. Rae*, 18 *Ill.* 488.

Ind.—*Louisville, etc., R. Co. v. Flanagan*, 113 *Ind.* 488, 3 *Am. St. Rep.* 674, 32 *Am. & Eng. R. Cas.* 532.

Idaho.—*McIntosh v. Oregon R. &*

persons indifferently, the law imposes upon it the duty of receiving and carrying them over its established route, and holds it liable, in an action based on its breach of contract, for a refusal or failure to receive and carry such goods; and it is not necessary to allege or prove any special contract.⁴ A corporation which

Nav. Co., 17 Idaho, 100, 105 Pac. 66, in the absence of special contract.

Iowa.—Cobb v. Illinois Cent. R. Co., 38 Iowa, 601.

Me.—New England Express Co. v. Maine Cent. R. R. Co., 57 Me. 188.

Mass.—Jordan v. Fall River R. Co., 5 Cush. (Mass.) 69.

Miss.—Southern Express Co. v. Moon, 39 Miss. 822.

N. J.—Lanning v. Sussex R. Co., 1 N. J. L. J. 21, a refusal to accept goods tendered for shipment, because of a personal dispute with the shipper, renders the company liable; Messenger v. Pennsylvania R. Co., 37 N. J. L. 531, 18 Am. Rep. 754.

N. C.—Reid v. Southern Ry. Co., 153 N. C. 490, 69 S. E. 618; Porter v. Raleigh & G. R. Co. (N. C.), 43 S. E. 547; Harrell v. Owens, 1 Dev. & B. (N. C.) 273; Anon. v. Jackson, 1 Hayw. (N. C.) 14.

S. C.—Avinger v. South Carolina R. Co., 29 S. C. 265, 13 Am. St. Rep. 716, 35 Am. & Eng. R. Cas. 519.

Tenn.—East Tennessee, etc., R. Co. v. Nelson, 1 Cold. (Tenn.) 272.

Wis.—Doty v. Strong, 1 Pin. (Wis.) 313, 40 Am. Dec. 773.

Can.—Greene v. St. John & M. R. Co., 22 N. B. 252; Thomas v. North Staffordshire R. Co., 3 Ry. & C. T. Cas. 1.

Eng.—Johnson v. Midland R. Co., 4 Exch. 367; Oxlade v. North Eastern R. Co., 15 C. B. N. S. 680, 109 E. C. L. 680, 9 Week. Rep. 272; Garton v. Bristol, etc., R. Co., 1 B. & S. 112,

101 E. C. L. 112, 7 Jur. N. S. 1234, 9 W. R. 734; Jackson v. Rogers, 2 Show. 327; Crouch v. Great Northern R. Co., 11 Exch. 742, 34 Eng. L. & Eq. 573; Morton v. Tibbett, 15 Q. B. 428, 69 E. C. L. 428, 15 A. & E. 428; Lane v. Cotton, 12 Mod. 472; Crouch v. London, etc., R. Co., 14 C. B. 255, 78 E. C. L. 255, in this respect there is no difference between the liability of a common carrier whose business is entirely within the country and that of one who transports goods to a point outside the country.

Switch connection.—A railroad company cannot discontinue an established switch connection with a coal mine, merely because the cars of another company may be taken upon its line over such switch, thereby endangering its property, and the lives of its passengers and employes. Chicago & A. R. Co. v. Suffern, 27 Ill. App. 404, affd. 129 Ill. 274, 21 N. E. 824.

Exemplary damages may be recovered against a railroad company which refuses to carry goods through ill will or willful disregard of the rights of the shipper. Avinger v. South Carolina R. Co., 29 S. C. 265, 7 S. E. 493, 13 Am. St. Rep. 716, 35 Am. & Eng. R. Cas. 519.

4. Lamar v. New York S. Nav. Co., 16 Ga. 558; Galena R. Co. v. Rae, 18 Ill. 488. See cases cited in preceding note on main proposition.

undertakes to operate a railroad franchise assumes all the duties which spring by law from the character of its business and from customs incident to it, and it tenders a continuing offer to the general public that it will perform those duties for the benefit of each of them, when demanded, which obligation is an enforceable contract.⁵ A common carrier cannot legally refuse to carry the goods of any person, or to accept them for carriage, except for just cause, nor can it lawfully discriminate in favor of any person as to facilities or price for transportation.⁶ Its duties in these respects cannot be avoided by the adoption of any rules or regulations; all rules and regulations of the carrier must be reasonable and made in good faith to properly protect the interests of the carrier, and unreasonable regulations will be held void and will not be enforced.⁷ A delivery of goods to a common carrier, and acceptance by it, to be conveyed, are a sufficient consideration for the contract to safely convey them.⁸ When the contract for

Tender and refusal must be shown.

—A party seeking to charge a railroad company with violation of a contract to transport coal for him, must show a tender and refusal. *Northwestern Fuel Co. v. Burlington, etc., Ry. Co.*, 20 Fed. 712. Evidence of plaintiff's purchase of the goods, and the agreement of the vendor to ship them in a certain manner, is inadmissible to show delivery to defendant. *New England Mfg. Co. v. Starin*, 60 Conn. 369, 22 Atl. 953. It is sufficient to show a proper tender. *Central, etc., R. Co. v. Morris*, 68 Tex. 49. See also, *St. Louis, etc., R. Co. v. Lee*, 69 Ark. 584, 65 S. W. 99.

Special contract need not be shown.—*Adams Express Co. v. Nock*, 2 Duv. (Ky.) 562, 87 Am. Dec. 510; *Doty v. Strong*, 1 Pin. (Wis.) 313, 40 Am. Dec. 773; *Fleming v. Mills*, 5 Mich. 420.

A receipt implies an agreement to carry.—A receipt for goods in the ordinary form implies an agreement to

transport them to their destination if it is on the carrier's line. *Landes v. Pacific R. Co.*, 50 Mo. 346, 3 Am. Ry. Rep. 288.

5. *Cumberland Teleph. & Teleg. Co. v. Morgan's L. & T. R. Co.*, 51 La. Ann. 29, 13 Am. & Eng. R. Cas. N. S. 71, 24 So. 803; *Standard Line & Stone Co. v. Cumberland Valley R. Co.*, 15 I. C. C. Rep. 620, citing *Moore on Carriers*, 1st Ed., p. 93.

6. *Great Western R. Co. v. Burns*, 60 Ill. 284, 12 Am. Ry. Rep. 309; *McDuffee v. Portland, etc., R. Co.*, 52 N. H. 430, 13 Am. Rep. 72, 2 Am. Ry. Rep. 261.

7. *Garton v. Bristol, etc., R. Co.*, 1 B. & S. 112, 101 E. C. L. 112, 30 L. J. Q. B. 273, 7 Jur. N. S. 1234; *Southern Express Co. v. Moon*, 39 Miss. 822; *Alsop v. Southern Express Co.*, 104 N. C. 278; *Three Hundred, etc., Tons of Coal*, 14 Blatchf. (U. S.) 453.

8. *McCauley v. Davidson*, 10 Minn. 418.

the transportation of the goods is silent as to the time of shipment, the law imports an obligation to ship within a reasonable time after the goods have been delivered for that purpose.⁹ The carrier is liable as an insurer for whatever damages may be the proximate consequence of any unreasonable delay in shipment.¹⁰ The wrongful refusal or failure of the carrier to transport the goods must be shown to have been the proximate cause of the loss or injury sustained, in order to render the carrier liable, although it need not be shown to have been the sole cause.¹¹ Recovery may be had where other causes contributed in producing the loss or injury, if the refusal or failure to transport was the proximate cause.¹² The rule of the common law that a person who holds himself out as a common carrier is obligated to take employment at the current price, which is the rule of the English courts, is not adhered to in the United States, unless the carrier has a particular route between fixed termini.¹³ A carrier, not a public institution, may select the character of goods it proposes to carry or discon-

9. *Pennsylvania Co. v. Clark*, 2 Ind. App. 146.

Duty to forward promptly.—*Stedman v. Western Transp. Co.*, 48 Barb. (N. Y.) 97; *Rankin v. Pacific R. Co.*, 55 Mo. 167; *Clarke v. Needles*, 25 Pa. St. 338; *Moses v. Boston, etc., R. Co.*, 24 N. H. 71, 55 Am. Dec. 222; *Waite v. New York Cent., etc., R. Co.*, 110 N. Y. 635, 35 Am. & Eng. R. Cas. 576; *Palmer v. Atchison, etc., R. Co.*, 101 Cal. 187; *St. Louis, etc., R. Co. v. Heath*, 41 Ark. 477, 18 Am. & Eng. R. Cas. 557; *Thomas v. Wabash, etc., R. Co.*, 63 Fed. Rep. 200; *Missouri Pac. R. Co. v. Hall*, 66 Fed. Rep. 868, 32 U. S. App. 60; *Gates v. Chicago, etc., R. Co.*, 42 Neb. 379, 61 Am. & Eng. R. Cas. 218; *Purcell v. Richmond, etc., R. Co.*, 108 N. C. 414; *International, etc., R. Co. v. Ritchie* (Tex. Civ. App.), 26 S. W. 840; *Berje v. Texas, etc., R. Co.*, 37 La. Ann. 468; *Louisville, etc., R. Co. v. Touart*, 97 Ala. 514.

10. *Lanning v. Sussex R. Co.*, 1 N. J. L. J. 21.

11. *Pittsburgh, etc., R. Co. v. Morton*, 61 Ind. 539; *Jones v. New York, etc., R. Co.*, 29 Barb. (N. Y.) 633; *St. Louis, etc., R. Co. v. Neel*, 56 Ark. 279, 55 Am. & Eng. R. Cas. 428; *Marine, etc., Ins. Co. v. St. Louis, etc., R. Co.*, 41 Fed. Rep. 643, 43 Am. & Eng. R. Cas. 79; *Scott v. Baltimore, etc., R. Co.*, 19 Fed. Rep. 56; *Thomas v. Lancaster Mills*, 19 C. C. A. 88, 71 Fed. Rep. 481.

12. *Missouri, etc., R. Co. v. McFadden*, 89 Tex. 138, 33 S. W. 853; *Hernsheim v. Newport News, etc., Co. (Ky.)*, 35 S. W. 1115; *St. Clair v. Chicago, etc., R. Co.*, 80 Iowa, 304; *Pittsburgh, etc., R. Co. v. Morton*, 61 Ind. 539; *Ruppel v. Alleghany Valley R. Co.*, 167 Pa. St. 166.

13. *Gordon v. Hutchinson*, 1 W. & S. (Pa.) 285, 37 Am. Dec. 464; *Pittsburgh, etc., R. Co. v. Morton*, 61 Ind. 539, 28 Am. Rep. 682.

tinue to carry a particular class.¹⁴ A railway company owes the same duty to carry goods to an industrial plant connected with its line by spur tracks that it does to plants situated on the main line.¹⁵ A railway company operating a belt line cannot refuse to transport coal between a mine and industrial plants on such line because it has never hauled coal before.¹⁶ A carrier may refuse to accept an interstate shipment for a point on a connecting line which has not complied with the requirements of the Interstate Commerce Act.¹⁷ In the absence of evidence, the carriage of money is strictly speaking not in the line of the duty of a carrier holding himself out only as a carrier of goods, wares, and merchandise.¹⁸ A common carrier need not receive for transportation goods from any person other than the owner or his duly authorized agent.¹⁹ A carrier, furnishing sufficient facilities of its own for the receipt and delivery of freight, is under no common-law duty to receive or deliver freight on private spur tracks.²⁰ Whether the duty a common carrier owes to the public is materially and injuriously affected by the contract obligation of the corporation to individuals cannot be arbitrarily determined by the corporation for itself.²¹ A railroad corporation as a common carrier is under

14. *Ocean S. S. Co. of Savannah v. Savannah Locomotive Works & Supply Co.*, 131 Ga. 831, 63 S. E. 577, 20 L. R. A. (U. S.) 867.

15. *Crescent Coal Co. v. Louisville & N. R. Co.*, 143 Ky. 73, 135 S. W. 768.

16. *Crescent Coal Co. v. Louisville & N. R. Co.*, 143 Ky. 73, 135 S. W. 768.

17. *Crescent Brewing Co. v. Oregon Short Line R. Co.*, — Idaho, —, 132 Pac. 975.

18. *Chesapeake & O. Ry. Co. v. Hall*, 136 Ky. 379, 124 S. W. 372.

Where a carrier holds itself out as engaged only in the carriage of specified articles, it is under no obligation to carry other things. *Louisville & N. R. Co. v. Higdon*, 149 Ky. 321, 148 S. W. 26.

No length of time or manner of treatment or habit of dealing will discharge a common carrier when requested from the obligation to furnish to the public the service it is engaged in performing. *Id.*

19. *Drake v. Nashville, etc., R. Co.*, 125 Tenn. 627, 148 S. W. 214.

20. *Gulf Compress Co. v. Alabama G. S. R. Co.*, 100 Miss. 582, 56 So. 666.

Where a carrier received and delivered freight on private spur tracks, generally under contracts between the parties, it did not show a custom, imposing on the carrier a duty to deliver or receive freight on private spur tracks, if such a duty could be created by custom. *Id.*

21. *Taylor v. Florida East Coast Ry. Co.*, 54 Fla. 636, 45 So. 574.

no legal duty to haul show cars, that is, cars owned and fitted up by showmen and used exclusively by them to house and transport their employees and show property as a complete outfit from place to place over railroads.²² There is no common-law duty resting upon an express company to act as collection agent of the shipper and require payment of the goods as a condition of their delivery; but such obligation, if assumed, arises only from an independent contract, express or implied, which the company is at liberty to refuse to make in any particular case, notwithstanding any usage or custom it may have established or followed, which cannot enlarge its legal duty as a carrier.²³

§ 3. Must haul cars and freight of other carriers.

Railroad companies, invested with important powers and franchises by the State, become to a certain extent public agents, and in the exercise of their calling, they are held to strict performance of the public duties enjoined upon them as a consideration for the rights and powers thus granted.²⁴ They are thus bound to transport or haul upon their roads the cars and freight of any other railroad company, when requested so to do, and hold the same relation as a common carrier to such cars and freight that they do to ordinary freight received by them for transportation; and in case of loss are held to the same measure and character of liability as would attach in respect to any other property.²⁵ In

22. *Cleveland, etc., Ry. Co. v. Henry*, 170 Ind. 94, 83 N. E. 710, revg. judg. (Ind. App.) 80 N. E. 636.

23. *Danciger v. Wells, Fargo & Co.*, 154 Fed. 379; *Danciger v. Pacific Express Co.*, 154 Fed. 379.

24. *People v. New York Cent., etc., R. Co.*, 28 Hun (N. Y.), 543, 3 Civ. Pro. Rep. (N. Y.) 11, 9 Am. & Eng. R. Cas. 1; *Messenger v. Pennsylvania R. Co.*, 37 N. J. L. 531, 18 Am. Rep. 754; *Railroad Com'r v. Portland, etc., R. Co.*, 63 Me. 269; *State v. Railroad Co.*, 29 Conn. 538; *Com'r v. Eastern R. Co.*, 103 Mass. 258; *Sandford v. Catawissa, etc., R. Co.*, 24

Pa. St. 378; *McDuffee v. Portland & R. R. Co.*, 52 N. H. 430; *Olcott v. Fond du Lac County*, 16 Wall. (U. S.) 678; *Burlington, etc., R. Co. v. Spearman*, 12 Iowa, 117; *Bradley v. New York, etc., R. Co.*, 21 Conn. 294; *Worcester v. Western R. Corp.*, 4 Metc. (Mass.) 564; *Wier v. St. Paul, etc., R. Co.*, 18 Minn. 155; *Rogers Locomotive, etc., Works v. Erie R. Co.*, 20 N. J. Eq. 379; *National Docks R. Co. v. Central R. Co.*, 32 N. J. Eq. 755; *Peik v. Chicago, etc., R. Co.*, 94 U. S. 179; *Winona, etc., R. Co. v. Blake*, 94 U. S. 180.

25. *Mallory v. Tioga R. Co.*, 39

same States, railroad companies are required by statute to receive and haul the cars and freight of other carriers.²⁶ Such statutes have been held to be constitutional,²⁷ and must be complied with, except for just cause, as where the cars are so defectively constructed as to endanger the lives or limbs of employees.²⁸ But a railroad company is not bound to transport freight in foreign cars, when its own cars are not in use but are free to be employed in the transportation desired, or where a transfer of the freight will not be injurious to it; and it is no proof of negligence to show that such transfer of the freight was made.²⁹ A carrier is bound to receive cars of other carriers for transportation over its line when requested, and occupies the same relation to such

Barb. (N. Y.) 488; Peoria, etc., R. Co. v. Chicago, etc., R. Co., 109 Ill. 135, 50 Am. Rep. 605, 18 Am. & Eng. R. Cas. 506; Peoria, etc., R. Co. v. United States Rolling Stock Co., 136 Ill. 643, 29 Am. St. Rep. 348; New Jersey R. Co. v. Pennsylvania R. Co., 27 N. J. L. 100; Vermont, etc., R. Co. v. Fitchburg R. Co., 14 Allen (Mass.), 462, 92 Am. Dec. 785; Atchison, etc., R. Co. v. Denver, etc., R. Co., 110 U. S. 667, 16 Am. & Eng. R. Cas. 57; Rogers Locomotive, etc., Works v. Erie R. Co., 20 N. J. Eq. 379; Greene v. St. John, etc., R. Co., 22 N. B. (Can.) 252; Beers v. Wabash, etc., R. Co., 34 Fed. Rep. 244, 35 Am. & Eng. R. Cas. 646; Chicago, etc., R. Co. v. Burlington, etc., R. Co., 34 Fed. Rep. 481, 35 Am. & Eng. R. Cas. 650, note; Standard Lime & Stone Co. v. Cumberland Valley R. Co., 15 I. C. C. Rep. 620, citing Moore on Carriers, 1st Ed., p. 95.

26. Michigan Cent. R. Co. v. Smithson, 45 Mich. 212, 1 Am. & Eng. R. Cas. 101; Texas, etc., R. Co. v. Carlton, 60 Tex. 397, 15 Am. & Eng. R. Cas. 350.

27. Rae v. Grand Trunk R. Co., 14

Fed. Rep. 401, 9 Am. & Eng. R. Cas. 470.

28. Texas, etc., R. Co. v. Carlton, 60 Tex. 397, 15 Am. & Eng. R. Cas. 350.

Not entitled to extra hauling charge.—A railroad company is not entitled to demand payment of a further charge for hauling the cars, where they are loaded with goods and a charge is made for the transportation of the goods. Harrison v. Midland R. Co., 62 L. J. Q. B. 225, 68 L. T. 268, 5 R. 445.

29. Oregon Short Line, etc., R. Co. v. Northern Pac. R. Co., 61 Fed. 160, affg. 51 Fed. 465, 51 Am. & Eng. R. Cas. 145, wherein it was also held that a refusal to so transport freight originating east of a certain meridian was not an unreasonable discrimination against another railroad company, or a denial to it of reasonable and proper facilities under the Interstate Commerce Act, although it accepts in such cars freight originating west of such meridian. McAlister v. Chicago, etc., R. Co., 74 Mo. 351, 7 Am. & Eng. R. Cas. 373. See also, Connecting Carriers, chap. 20.

cars as to ordinary freight, and is liable to the owner in the same manner as to any other shipper.³⁰ A railroad company is liable to a connecting carrier for the loss of the latter's cars by fire while in the possession and control of the former company, but standing in the yard of a terminal company, awaiting orders from consignees for further movement, where the contract with the terminal company is not for the storage of the cars, but merely for terminal facilities and storage.³¹ A railroad company must receive and transport cars of other companies, if not defective, or from construction unreasonably hazardous.³²

§ 4. May be compelled by mandamus:

A railroad corporation is compellable by mandamus to exercise its duties as a common carrier of freight and passengers; and the power so to compel it rests equally firmly on the ground that the duty is a public trust which, having been conferred by the State and accepted by the corporation, may be enforced for the public benefit, and upon the contract between the corporation and the State, expressed in its charter or implied by the acceptance of the franchise; and also upon the ground that the common right of all people to travel and carry upon every public highway of the State has been changed by the legislature, for adequate reasons, into a corporate franchise to be exercised solely by a corporate body for the public benefit, to the exclusion of all other persons, whereby it has become the duty of the State to see to it that the franchise so put in trust be faithfully administered by the trustee.³³

30. *Pittsburg, etc., Ry. Co. v. City of Chicago*, 242 Ill. 178, 89 N. E. 1022.

31. *Bosworth v. Chicago, etc., R. Co.*, 87 Fed. 72, 30 C. C. A. 541. On appeal, see *Bosworth v. Carr, Rider & Engler Co.*, 21 Sup. Ct. 194, 179 U. S. 444, 45 L. Ed. 268; *Chicago, etc., R. Co. v. Bosworth*, 21 Sup. Ct. 183, 179 U. S. 442, 45 L. Ed. 267; *Hunting Elevator Co. v. Bosworth*, 21 Sup. Ct. 183, 179 U. S. 415, 45 L. Ed. 256; *Raw v. Bosworth*, 21 Sup. Ct. 194, 179 U. S. 443, 45 L. Ed. 268.

32. *Chicago, etc., R. Co. v. Curtis*, 51 Neb. 442, 71 N. W. 42, 66 Am. St. Rep. 456.

33. *People v. New York Cent., etc., R. Co.*, 28 Hun (N. Y.), 543, 3 Civ. Pro. Rep. (N. Y.) 11, 9 Am. & Eng. R. Cas. 1, 2 McCarthy (N. Y.) 345; *Abbott v. Johnstown, etc., H. R. Co.*, 80 N. Y. 31, 36 Am. Rep. 572; *Union Pac. R. Co. v. Hall*, 91 U. S. 343; *People v. Colorado Cent. R. Co.*, 42 Fed. Rep. 638, 45 Am. & Eng. R. Cas. 599; *Railroad Com'rs v. Portland, etc., R. Co.*, 63 Me. 269, 18 Am. Rep.

A mandatory injunction will issue to compel a railroad company to perform its duty to the public of hauling the cars of another company.³⁴ If the remedy at law is not so plain, adequate, and complete as one obtainable in equity, in the case of a continuing trespass, the party may prevent the injury by injunction, rather than wait until it is done and then look for his damages in a court of law.³⁵ Refusal or failure of a railroad company to perform its duties as a common carrier cannot be excused for the reason that a strike on one road will be extended to the other, if it hauls the cars; ³⁶ nor by the fact that its skilled freight-handlers have refused to work for the wages theretofore paid, when no unlawful violence on their part is shown.³⁷ A proper and usual remedy, in the case of an individual, for a wrongful refusal to receive and transport property, is an action at law for damages, the measure of which is the difference between the value thereof at the place where it was tendered to be transported, and its value at the place of destination, less the expenses of carriage.³⁸ A common carrier

208; *State v. Hartford, etc., R. Co.*, 29 Conn. 538; *Ex parte Atty-Gen.*, 17 N. B. (Can.) 667.

Although it has no schedule of prices for certain goods, a railroad company may be compelled to transport as a common carrier such goods, for instance, telegraph poles, wires, and cross-arms, leaving it free to charge for its services upon a *quantum meruit*. *Cumberland Teleph. & Teleg. Co. v. Morgan's L. & T. R. Co.*, 51 La. Ann. 29, 13 Am. & Eng. R. Cas. N. S. 71, 24 So. 803.

Although the shipper could recover damages for failure to receive and ship the goods, the company may be compelled to transport the freight offered for shipment, as the shipper is entitled to the transportation of his freight and not the payment of money, and the latter would not furnish an adequate remedy. *Id.*

34. *Chicago, etc., Ry. Co. v. Burlington, etc., Ry. Co.*, 34 Fed. Rep.

481, 35 Am. & Eng. R. Cas. 650; *Standard Lime & Stone Co. v. Cumberland Valley R. Co.*, 15 I. C. C. Rep. 620, citing *Moore on Carriers*, 1st Ed., p. 96.

35. *Payne v. Kansas & A. V. R. Co. (C. C. W. D., Ark.)*, 46 Fed. Rep. 546, 47 Am. & Eng. R. Cas. 235; *Rogers Locomotive, etc., Works v. Erie R. Co.*, 20 N. J. Eq. 379; *Butchers', etc., Stock-Yards Co. v. Louisville, etc., R. Co.*, 67 Fed. Rep. 35; *Baltimore, etc., R. Co. v. Pennsylvania R. Co.*, 18 Am. & Eng. R. Cas. 511.

36. *Chicago, etc., Ry. Co. v. Burlington, etc., Ry. Co.*, 34 Fed. Rep. 481, 35 Am. & Eng. R. Cas. 650.

37. *People v. New York Cent., etc., R. Co.*, 28 Hun (N. Y.), 543, 3 Civ. Pro. Rep. (N. Y.) 11, 9 Am. & Eng. R. Cas. 1, revg. 63 How. Pr. (N. Y.) 291.

38. *People v. New York, etc., R. Co.*, 22 Hun (N. Y.), 533.

may be compelled by mandamus or other writ to treat all shippers alike.³⁹ Where a railroad company undertakes to render as a common carrier particular services to one person, it cannot lawfully refuse to render similar services to other persons under like circumstances upon the payment of like compensation, and if it does so refuse it may be compelled by mandamus to render to all, under like circumstances, the same services, in the same manner, and for the same compensation.⁴⁰ In mandamus by a coal miner to compel a railroad company to furnish cars, which it refused to do unless he would sell his coal to a company controlled by the president of the railroad company, it is immaterial that other shippers were refused cars for the same reason.⁴¹

§ 5. When failure or refusal to carry is legally excusable.

A common carrier of goods is not under obligation to accept and carry all personal property that may be offered to it. Its duty is limited to accepting and carrying property of such kinds, to and from such places, as it publicly professes and undertakes, or is accustomed, to carry, and has the facilities for so doing.⁴² If

39. *Missouri Pac. Ry. Co. v. Larabee Flour Mills Co.*, 211 U. S. 612, 29 Sup. Ct. 214, 53 L. Ed. —, affg. *Larabee Flour Mills Co. v. Missouri Pac. Ry. Co.*, 74 Kan. 808, 88 Pac. 72. See also, *State v. Chicago, etc., R. Co.*, 72 Neb. 542, 101 N. W. 23, where the evidence was held insufficient to show any discrimination in furnishing cars needed for this shipment of freight so as to authorize a writ of mandamus against a carrier.

40. *State v. Atlantic Coast Line R. Co.*, — Fla. —, 40 So. 875.

Where a railroad company acting as a common carrier delivers between stations on its line the poles and wires of one telegraph company, it may be compelled by mandamus to perform a similar service for another telegraph company, nor is its duty affected by reason of the ser-

vice being performed under a contract. *State v. Atlantic Coast Line R. Co.*, 51 Fla. 543, 41 So. 529.

41. *Loraine v. Pittsburg, etc., R. Co.*, 205 Pa. 132, 54 Atl. 580, 61 L. R. A. 502.

42. *Pfister v. Central Pac. R. Co.*, 70 Cal. 169, 59 Am. Rep. 404, 27 Am. & Eng. R. Cas. 246, holding that money to the amount of \$90,000 is not "luggage," which a railroad company is compelled to carry with or for a passenger, and that the company may insist that the money shall go *via* an express company, for which, under a special contract, the railroad company furnishes facilities. The court, in that case, said: "That class of carriers known as 'transfer companies,' engaged in receiving and transferring the baggage of passengers to and from public conveyances

it has never assumed or offered to carry chattels of a certain class, except upon special terms exempting it from all the important duties and liabilities of a common carrier, it cannot be made amenable in the character of a common carrier as to such property.⁴³ The carrier may determine by public announcement or profession the kind of goods it will carry, the conveyances to be used, and the manner and time for transportation, the conditions

by land and water, are under no obligation to accept and carry ordinary merchandise. A parcel delivery express company need not receive and deliver hay, lumber, or other articles too bulky, heavy, or otherwise inconvenient to handle and transfer by its usual facilities. In other words, the duty of the carrier is confined, as is provided by our Code, to accepting and carrying property of a kind that he undertakes or is accustomed to carry."

"A person may profess to carry a particular description of goods only, for instance cattle or dry goods, in which case he could not be compelled to carry any other kind of goods; or he may limit his obligation to carrying from one place to another, as from Manchester to London, and then he would not be bound to carry to and from intermediate points. Still, until he retracts, every individual (provided he tenders the money at the time and there is room in the conveyance) has a right to call upon him to receive and carry goods according to his public profession." *Johnson v. Midland R. Co.*, 4 Exch. 367, 6 Railw. Cas. 61, 1 Ry. & C. T. Cas. 16.

Carrier may restrict or limit its traffic.—If a railroad company does not hold itself out as a common carrier of coal, it is not obliged to carry coal from station to station or for coal merchants, and may restrict its

coal traffic to the carriage of coal for collier owners, from the pit's mouth to stations where such collier owners have their depots. *Oxlade v. North Eastern R. Co.*, 1 C. B. N. S. 454, 87 E. C. L. 454, 15 C. B. N. S. 680, 109 E. C. L. 680, 9 W. R. 272, 3 L. T. N. S. 671. See *Thomas v. North Staffordshire R. Co.*, 3 Ry. & C. T. Cas. 1, 21 Sol. Jour. 183.

A carrier holding itself out as a through carrier to the seaboard cannot excuse itself for failure to furnish facilities for carrying goods to the seaboard by reason of the fact that its terminus is an inland town, and the fact that its uniform bill of lading expressly limits its liability to its own line, where there is nothing on the bill of lading to indicate the terminus of the line. *Pittsburgh, C. C. & St. L. Ry. Co. v. Wood*, (Ind. App.) 84 N. E. 1009.

43. *Lake Shore, etc., R. Co. v. Perkins*, 25 Mich. 329, 12 Am. Rep. 275, so held, in a case for a refusal to carry live stock. See also, *Michigan Southern R. Co. v. McDonough*, 21 Mich. 165. The general rule, however, as held elsewhere, is that the responsibility of a railroad company which receives live stock for transportation, unless limited by special contract, is that of a common carrier. *Kansas Pac. R. Co. v. Nichols*, 9 Kan. 235. See also cases cited under § 3, chap. 21.

fixed being such as are just and reasonable, and treating all alike.⁴⁴ It may make reasonable rules and regulations for the reception, carriage, and delivery of freight, including the classification and suitable preparation of articles for shipment.⁴⁵ A common carrier may make rules for its conduct, fixing the times, the places, the methods, and the forms in which it will receive commodities it offers to transport, and these rules are presumptively reasonable and just.⁴⁶ It may alter and modify such rules from time to time on reasonable notice to the public.⁴⁷ It may legally refuse to receive goods, if it does not carry to the place to which the shipper wishes to ship the goods;⁴⁸ or, if they are offered at a time unreasonably long before the accustomed or appointed time for departure of its conveyance.⁴⁹ The carrier may require that freight be delivered to it at a prescribed time prior to the departure of a train, reasonably sufficient to enable it to make up its train and prepare the goods for shipment, and may refuse goods not offered at a reasonable time before the departure of the train.⁵⁰ The reasonableness of the time within which a carrier must receive moneys or goods for transportation is measured primarily by its relation to the transportation of the property, to the business of the carrier, and proper consideration of the business of its customers.⁵¹

44. *Oxlade v. North Eastern R. Co.*, 1 C. B. N. S. 454, 87 E. C. L. 454, 15 C. B. N. S. 680, 109 E. C. L. 680, 9 W. R. 272; *Garton v. Bristol, etc.*, R. Co., 28 L. J. C. P. 158, 5 C. B. N. S. 669; *Bouker v. Long Island R. Co.*, 89 Hun. (N. Y.), 202, 35 N. Y. Supp. 23, 25.

45. *Chicago, R. I. & P. Ry. Co. v. Colby* (Neb.), 96 N. W. 145; *National Petroleum Ass'n v. Louisville & N. R. Co.*, 15 I. C. C. Rep. 476, citing *Moore on Carriers*, 1st Ed.

46. *Platt v. Lecocq*, 158 Fed. 723, 85 C. C. A. 621, 15 L. R. A. (N. S.) 558, revg. 150 Fed. 391.

47. *United States v. Oregon R. & Nav. Co.*, 159 Fed. 975; *Robinson v. Baltimore & O. R. Co.*, 129 Fed. 753; *Harp v. Choctaw, etc.*, R. Co., 125 Fed. 445.

48. *Pitlock v. Wells, Fargo & Co.*, 109 Mass. 452.

But that the point to which freight is to be consigned is not a regular station, at which an agent of the carrier is kept, is not a valid excuse for the carrier's refusal to receive the freight for shipment. *Reid & Beam v. Southern Ry. Co.*, 149 N. C. 423, 63 S. E. 112.

49. *Pickford v. Grand Junction R. Co.*, 12 M. & W. 766; *Lane v. Cotton*, 1 Ld. Raym. 652; *Story, Bailm.* § 508.

50. *Palmer v. London, etc.*, R. Co., L. R. 1 C. P. 588; *Lane v. Cotton*, 1 Ld. Raym. 652; *Garten v. Bristol, etc.*, R. Co., 28 L. J. C. P. 306.

51. *Platt v. Lecocq*, 158 Fed. 723, 85 C. C. A. 621, 15 L. R. A. (N. S.) 558, revg. 150 Fed. 391.

It may refuse to accept or carry goods not offered at a proper place or to a proper person, such as at its established office, or regular station or depot, or to its appointed or authorized agent.⁵² It may lawfully refuse to receive goods if they are improperly or defectively packed, insufficiently secured or addressed, in a damaged state, or otherwise not properly prepared for shipment, or in an unfit condition for carriage, or in a condition necessarily involving extra care and risk in their shipment.⁵³ It may lawfully refuse to receive or carry goods of an explosive or dangerous character such as dynamite, nitro-glycerine, vitriol, etc.;⁵⁴ or goods

The rules and practice of an express company to refuse to receive money for transportation from a bank, which has a burglar-proof vault and adequate facilities in the city where the packages were tendered to keep them safely over night, on the day preceding the departure of the only trains which carried express matter to the destination of the packages, and which left at various times between 6:29 and 8 o'clock a. m., are not unreasonable or unlawful. *Platt v. Leccocq*, 158 Fed. 723, 85 C. C. A. 621, 15 L. R. A. (N. S.) 558, revg. 150 Fed. 391.

52. *Cronkite v. Wells*, 32 N. Y. 247; *Louisville, etc., R. Co. v. Flanagan*, 113 Ind. 488, 3 Am. St. Rep. 674, 32 Am. & Eng. R. Cas. 532; *Kansas City, etc., R. Co. v. Lilly* (Miss.), 8 So. 644, 45 Am. & Eng. R. Cas. 379; *Kellogg v. Suffolk, etc., R. Co.*, 100 N. C. 158, 35 Am. & Eng. R. Cas. 529; *Land v. Wilmington, etc., R. Co.*, 104 N. C. 48, 40 Am. & Eng. R. Cas. 18; *Chicago, etc., R. Co. v. Flagg*, 43 Ill. 364, 92 Am. Dec. 133; *State v. New Haven, etc., R. Co.*, 41 Conn. 134; *St. Louis, etc., R. Co. v. Lee*, 69 Ark. 584, 65 S. W. 99.

53. *Elgin, etc., Ry. Co. v. Bates Mach. Co.*, 98 Ill. App. 311, affd. 200

Ill. 636, 66 N. E. 326, 93 Am. St. Rep. 218; *Union Express Co. v. Graham*, 26 Ohio St. 595; *Fitzgerald v. Adams Express Co.*, 24 Ind. 447, 87 Am. Dec. 341; *Missouri Pac. R. Co. v. Weissman*, 2 Tex. Civ. App. 86; *Hart v. Baxendale*, 16 L. T. N. S. 390, 6 Exch. 769, 16 Jur. 126; *Munster v. South Eastern R. Co.*, 4 C. B. N. S. 676, 93 E. C. L. 676, 27 L. J. C. P. 308.

54. *Nitro-glycerine Case*, 15 Wall. (U. S.) 524; *Boston, etc., R. Co. v. Shanly*, 107 Mass. 568, 12 Am. L. Reg. N. S. 500; *Farrant v. Barnes*, 11 C. B. N. S. 553, 103 E. C. L. 553; *Williams v. East India Co.*, 3 East, 192; *Brass v. Maitland*, 3 El. & Bl. 471, 88 E. C. L. 471. The carrier has a right of action against a shipper for any damage resulting from the explosion of such articles shipped without notice of their character. *Id.*

A carrier has the right to inspect proffered shipments and to refuse them when not in fit condition for transportation, and, where ordinary observation would discover their unfitness, it is the duty of the carrier to refuse the shipment in order that the shipper may put it into a fit condition for transportation. *Atlantic*

which the law prohibits it from carrying, such as intoxicating liquors.⁵⁵ But it cannot lawfully refuse to transport liquors because of the passage of an invalid ordinance prohibiting the transportation and delivery of intoxicating liquors within a city.⁵⁶ It has the right to demand an examination and to be made acquainted with the contents of packages, where there is reasonable ground for believing that they are of a dangerous character; but, in the absence of reasonable grounds for suspecting them to be of a dangerous character, it cannot compel the owner or person offering them for shipment to disclose their nature.⁵⁷ A carrier is not required to receive goods tendered for shipment which are injurious to the public health, peace, or morals, or likely to destroy the property of others, or which are in such condition that they cannot be safely transported.⁵⁸ The fact that its route is exposed to extraordinary danger at the time of shipment and the goods would be liable to exposure to the fury of a mob, destruction by

Coast Line R. Co. v. Rice, 169 Ala. 265, 52 So. 918.

Where a carload of staves was offered for shipment on the car of another railway, and the car was in a dangerous condition, it was, under the rules of the railroad commission, the duty of the shipper to load such staves on another car, or of the railroad offering the car for further shipment, and not the duty of the receiving carrier, to have the contents of the damaged car unloaded and loaded into a safe car. *Central of Ga. Ry. Co. v. Cook & Lockett*, 4 Ga. App. 698, 62 S. E. 464.

55. *State v. Goss*, 59 Vt. 266, 59 Am. Rep. 706, 30 Am. & Eng. R. Cas. 118; *Milwaukee Malt Ext. Co. v. Chicago, etc., R. Co.*, 73 Iowa, 98.

Shipment of deer.—Under the New York Forest, Fish, and Game Law, § 8, as amended by Laws 1906, p. 1337, c. 478, § 2, prohibiting the shipment of deer, whether wild or domesticated, a common carrier may refuse to ship the meat of domesticated deer,

which belong to plaintiff and are not kept in close confinement, though the deer was killed to prevent it from injuring others and to preserve the herd. *Dietrich v. Fargo*, 52 Misc. Rep. (N. Y.) 200, 102 N. Y. Supp. 720.

56. *Southern Express Co. v. R. M. Rose Co.*, 124 Ga. 581, 53 S. E. 185.

A State statute imposing a tax upon persons carrying liquor C. O. D. has been held sufficient to warrant an express company in refusing to carry liquor in that manner, since it could either pay the license tax or refuse to carry the liquor C. O. D. *L. Craddock & Co. v. Wells Fargo Co. Express*, — Tex. Civ. App. —, 125 S. W. 59.

57. *Niara-glycerine Case*, 15 Wall. (U. S.) 524; *Norfolk, etc., R. Co. v. Irvine*, 84 Va. 553, 85 Va. 217, 37 Am. & Eng. R. Cas. 227.

58. *Coweta County v. Central of Ga. Ry. Co.*, 4 Ga. App. 94, 60 S. E. 1018.

a popular outbreak, or capture by hostile military forces, will sufficiently excuse a refusal to receive and carry goods.⁵⁹ An impending flood of such a character as to properly fall within the definition of an act of God, and which threatened with inundation the carrier's railroad tracks, is a sufficient excuse to justify the carrier in refusing to accept a shipment of freight.⁶⁰ A road so under military control of the government, transporting troops and munitions of war, as not to be in free exercise of its franchise, is not liable as a common carrier for refusing to receive freights for transportation.⁶¹ But the carrier is liable for delay in forwarding goods accepted for shipment, although the road was under military control, the probability of delay on account of blockades on the side tracks and other hindrances being known to the officers of the company at the time of accepting the goods.⁶² While the corporation might have limited its liability, yet as it had not done so plaintiff was entitled to recover.⁶³ When the goods offered for shipment are perishable, if the carrier has not the means for immediate transportation, it may refuse to receive the goods;⁶⁴ but, as to other goods, this rule does not apply, and where the carrier has not the facilities for immediate transportation, owing to unexpected accumulation of business or otherwise, it must receive the goods to be forwarded as soon as its facilities will permit; and it is excusable only for reasonable delay in transportation.⁶⁵ The carrier may also require prepayment of its freight charges and may refuse to carry the goods unless they are paid, when de-

59. *Edwards v. Sherratt*, 1 East, 604; *Pearson v. Duane*, 71 U. S. (4 Wall.) 605, 18 L. Ed. 447, holding that the master of a vessel would be justified in refusing passage to a passenger proceeding to a place under a revolutionary government, by which he has been sentenced to death in case of his return. Compare *Illinois Cent. R. Co. v. Schwartz*, 13 Ill. App. 490.

60. *Gray v. Wabash R. Co.*, 119 Mo. App. 144, 95 S. W. 983.

61. *Phelps v. Illinois Cent. R. Co.*, 94 Ill. 548; *Illinois Cent. R. Co. v.*

Phelps, 4 Ill. App. 238. See also, *Illinois Cent. R. Co. v. Homberger*, 77 Ill. 457, where the delivery was held not to have been completed so as to make the company liable.

62. *Illinois Cent. R. Co. v. Cobb*, 64 Ill. 128.

63. *Illinois Cent. R. Co. v. Schwartz*, 13 Ill. App. 490.

64. *Tierney v. New York Cent., etc., R. Co.*, 76 N. Y. 305, affg. 10 Hun (N. Y.), 569, 67 Barb. (N. Y.) 538.

65. See *Duty to furnish facilities for transportation*, § 8, *post*.

manded.⁶⁶ The rule, however, may be otherwise, where a different usage, long established, has prevailed.⁶⁷ Generally, it may be said that if a common carrier has reasonable grounds for not receiving goods offered to it for transportation, it may do so; but if it once receives them, it will be considered as waiving its right to refuse them and as accepting them in the usual way, and becomes an insurer and subject to all the liabilities of a common carrier, in the absence of special limitation of its liability in the contract of carriage.⁶⁸

§ 6. May demand prepayment of charges.

A carrier may require prepayment of freight charges from any shipper, at its choice, and may lawfully refuse to receive freight from a receiving carrier without such prepayment, although it does not require it from others; but notice of such requirement should be given to the shipper or receiving carrier.⁶⁹ Whether a

66. See May demand prepayment of charges, § 6, *post*.

The Texas statute, requiring railroad corporations to take and transport property on the due payment of the legal freight, does not contemplate prepayment, and where a draft was given the railroad for the freight, on the making out of the bill of lading, and was forwarded with the bill of lading and paid on presentation, it was due payment. *Dorrance & Co. v. International & G. N. R. Co.* (Tex.), 125 S. W. 561.

67. See May demand prepayment of charges, § 6, *post*.

68. *Porcher v. North Eastern R. Co.*, 14 Rich. L. (S. C.) 181; *The David & Caroline*, 5 Blatchf. (U. S.) 266; *Hannibal, etc., R. Co. v. Swift*, 79 U. S. (12 Wall.) 262, 20 L. Ed. 423; *Pickford v. Grand Junction R. Co.*, 12 M. & W. 766; *Great Northern R. Co. v. Shepherd*, 8 Exch. 30, 14 Eng. L. & Eq. 367.

A railroad company cannot refuse to accept and transport coal tendered

by a shipper, because it is inferior in quality to other coal also produced on its line, and that the marketing of such coal will injuriously affect the sale and consequently the shipment of the superior quality. *Olanda Coal Min. Co. v. Beech Creek R. Co.*, 144 Fed. 150.

A carrier held liable for refusal to accept for transportation cordwood which a shipper had offered to stack at a point along its track where it had been accustomed to receive similar shipments. *Ethridge v. Central of Ga. Ry. Co.*, 136 Ga. 677, 71 S. E. 1063.

69. *Lehigh Valley Transp. Co. v. Post Sugar Co.*, 128 Ill. App. 600, *affd.* 228 Ill. 121, 81 N. E. 819; *Illinois Cent. R. Co. v. Frankenberg*, 54 Ill. 88, 5 Am. Rep. 92; *Randall v. Richmond & D. R. Co.*, 108 N. C. 612, 13 S. E. 137, 49 Am. & Eng. R. Cas. 75; *Missouri Pac. R. Co. v. Weissman*, 2 Tex. Civ. App. 86; *Fitch v. Newberry*, 1 Doug. (Mich.) 1, 40 Am.

railroad company can excuse a refusal to accept and carry freight on the ground that the charges were not prepaid may depend upon its custom as to collecting charges, which is ordinarily a question for the jury.⁷⁰ Where a carrier, in an action against it for failure to carry goods delivered to it, claims that its refusal was because the freight had not been paid, plaintiff may show the value of the goods, for the purpose of showing that defendant had ample security, and that there was no reason for stopping them in transit.⁷¹ In an action against a carrier for a failure or refusal to carry it is not necessary to allege that a compensation was paid, or agreed to be paid, for carrying the goods;⁷² an averment that the plaintiff was ready and willing to pay is sufficient;⁷³ but in New York it is held that the complaint must state facts necessary to show a complete cause of action, or it is demurrable,⁷⁴ and in Texas it is held that plaintiff need not aver a tender of freight charges.⁷⁵ In order to maintain an action against a carrier for refusing to receive and carry, the plaintiff must, however, prove a tender of the customary freight charges, or a readiness and willingness to pay according to the course and usage of the company, whether that required them to be paid in advance or not.⁷⁶ An excessive demand by the carrier for freight charges relieves the consignee of the necessity of tendering any sum for such charges before bringing suit.⁷⁷ A railroad employe does not waive prepayment of freight charges before delivery of the cars by responding "all right" to a statement by the consignee that he would give a disposal order for the cars and would send the amount of the freight

Dec. 33; *A. G. Russell Co. v. Miller* 98 Miss. 185, 53 So. 495; *Batson v. Donovan*, 4 B. & Ald. 28, 6 E. C. L. 376; *Barnes v. Marshall*, 18 Q. B. 785, 83 E. C. L. 785; *Wyld v. Pickford*, 8 M. & W. 443; *Bastard v. Bastard*, 2 & W. 443; *Bastard v. Bastard*, 2 Show. 81.

70. *Reed v. Philadelphia, etc., R. Co.*, 3 Houst. (Del.) 176.

71. *Leach v. New York, etc., R. Co.*, 89 Hun (N. Y.), 377, 35 N. Y. Supp. 305.

72. *Hall v. Cheney*, 36 N. H. 26.

73. *Pickford v. Grand Junction R. Co.*, 8 M. & W. 372, 5 Jur. 731, 2 Ry. Cas. 592.

74. *Bristol v. Rensselaer, etc., R. Co.*, 9 Barb. (N. Y.) 158.

75. *Central, etc., R. Co. v. Morris*, 68 Tex. 49, 28 Am. & Eng. R. Cas. 50.

76. *Galena, etc., R. Co. v. Rae*, 18 Ill. 488, 68 Am. Dec. 574; *Pickford v. Grand Junction R. Co.*, *supra*.

77. *Moran Bros. Co. v. Northern P. R. Co.*, 19 Wash. 266, 53 Pac. 49.

whenever he got the expense notices and knew the amount.⁷⁸ Failure to tender or pay freight charges where they are not demanded, will not prevent a recovery for failure to provide a car for shipment at the time agreed upon.⁷⁹ If a railroad company receives freight and undertakes to carry it without exacting prepayment of the freight charges, it is bound to exercise the same care in carrying, storing, and holding it as if the charges had been prepaid.⁸⁰ And where a carrier has informed the owner that goods would be held until the freight charges are prepaid, but afterwards ships the goods without prepayment, and without notice to the owner, it is liable for any loss that may occur by reason of its manner of shipping.⁸¹ If a carrier does not demand prepayment, it cannot sue for the freight charges until delivery of or an offer to deliver the goods.⁸² The right of a common carrier to prepayment of its charges is waived if it accepts the goods for transportation without exacting such payment in advance, and liability attaches as though the freight were actually prepaid.⁸³ The carrier need not be paid in advance, unless he specially demands it.⁸⁴

§ 7. When carrier may select mode of transportation.

A common carrier who takes an article for transportation is liable for the exercise of its judgment as to the manner of carrying it, and cannot rely, in avoidance of its liability, on misrepresentations, unless they relate to matters not apparent to observation.⁸⁵ A railroad company may carry on a platform car a box so large that it cannot be got into a box car, due precaution being taken to keep it from getting wet.⁸⁶ In the absence of an express

78. *McEachran v. Grand Trunk R. Co.*, 115 Mich. 318, 73 N. W. 231, 4 Det. L. N. 879.

79. *Cleveland, etc., R. Co. v. Perishow*, 61 Ill. App. 179.

80. *St. Louis, etc., R. Co. v. Flanagan*, 23 Ill. App. 489.

81. *Campion v. Canadian Pac. R. Co.*, 43 Fed. Rep. 775.

82. *Barnes v. Marshall*, 18 Q. B. 785, 83 E. C. L. 785, 21 L. J. Q. B. 388.

83. *Gratiot Street Warehouse Co. v. Missouri, etc., Ry. Co.*, 124 Mo. App. 545, 102 S. W. 11.

84. *Wilson v. Grand Trunk Ry.*, 56 Me. 60, 96 Am. Dec. 435.

85. *New Jersey R. Co. v. Pennsylvania R. Co.*, 27 N. J. L. (3 Dutch.) 100.

86. *Burwell v. Raleigh, etc., R. Co.*, 94 N. C. 451, 25 Am. & Eng. R. Cas. 410.

contract, it is the duty of the carrier to transport goods received for transportation by the usual or customary route; and for any loss caused by a departure from such route, it is liable.⁸⁷ When there are two customary or usual routes, as, for example, one an inside or canal route, the other an outside or ocean route, the carrier may choose the route, without incurring increased liability.⁸⁸ But the carrier is liable for a loss of goods proved to have been occasioned by a want of due care, or by disobedience to instructions, notwithstanding exceptions in the bill of lading or receipt.⁸⁹ Where the contract gives the carrier an option between two modes of transportation, the option must be exercised with a view to the owner's interest.⁹⁰ Ordinarily the contract for transportation is presumed to be by the carrier's usual or customary route.⁹¹

§ 8. Duty to furnish shipper facilities for transportation.

The rule of the common law was that a carrier, having the room and means of carrying the goods, in the absence of special contract, was obliged to receive them, and not otherwise; and,

87. *Merchants' Despatch Transp. Co. v. Kahn*, 76 Ill. 520, where the company was held liable for the loss of goods by fire while being transported by another route than the most usual and direct one; *Express Co. v. Kountze*, 8 Wall. (U. S.) 342, where the company selected the most hazardous route of two; *Crosby v. Fitch*, 12 Conn. 410; *Smith v. Whitman*, 13 Mo. 352; *Powers v. Davenport*, 7 Blackf. (Ind.) 497; *Hand v. Baynes*, 4 Whart. (Pa.) 204; *Davis v. Garrett*, 6 Bing. 716.

Not bound to send goods on because of temporarily obstructed route.—A carrier whose established route was by rail to Philadelphia and by water to Boston, was held not bound to send goods on by rail from Philadelphia when there was an obstruction in the water communication temporarily. *Empire Transportation Co. v. Wal-*

lace, 68 Pa. St. 302, 8 Am. Rep. 178, 1 Am. Ry. Rep. 443.

In order to constitute constructive delivery of goods sold, they must be forwarded through the usual channels, and channels supposed to be in contemplation of the purchaser. *Comstock v. Affoelter*, 50 Mo. 411.

88. *White v. Ashton*, 51 N. Y. 280; *Hinckley v. New York Cent. etc., R. Co.*, 56 N. Y. 429; *Simkins v. Steamboat Co.*, 11 Cush. (Mass.) 102.

89. *Express Co. v. Kountze*, 8 Wall. (U. S.) 342; *Simon v. The Fung Shuey*, 21 La. Ann. 363; *Lamb v. Camden, etc., R. Co.*, 2 Daly (N. Y.) 454.

90. *Blitz v. Union Steamboat Co.*, 51 Mich. 558.

91. *Hales v. London, etc., R. Co.*, 4 B. & S. 66, 116 E. C. L. 66, 11 W. R. 856; *Empire Transp. Co. v. Wallace*, 68 Pa. St. 302, 8 Am. Rep. 178.

applying this rule, it has been held that press of business would excuse failure to carry goods in ordinary time, even when such press had existed for a long time and was known by the carrier when it received the goods, even though the carrier did not notify the shipper.⁹² But as regards railway companies and similar companies, which perform under their charters and franchises certain public functions, the rule is qualified, and they are held bound to have all reasonable and necessary facilities and appliances for conducting and carrying on in a prompt, skillful and careful manner the business in which they are engaged, and for transporting without unreasonable delay the usual and ordinary quantity of freight offered them for transportation, or which might reasonably and ordinarily be expected; and are liable in damages for unreasonable delay in carrying due to a want of such facilities.⁹³ This rule has been held to apply to furnishing refrigerator cars, although the company did not own any such cars, but had an arrangement with the owners of such cars whereby it could secure them for the use of shippers when needed;⁹⁴ and, under a statute, to granting facilities for the erection of an elevator at one of the stations of a railroad to persons engaged in the business of receiving, handling, and shipping grain over the railroad;⁹⁵ and to furnishing facilities for loading and unloading live stock;⁹⁶ to pro-

92. *Lovett v. Hobbs*, 2 Show. 127; *Riley v. Horne*, 5 Bing. 217; *Johnson v. Midland R. Co.*, 4 Exch. 367, 6 Ry. Cas. 61, 18 L. J. Exch. 366, "a common carrier is not bound to supply more carts than he is in the habit of supplying because more goods are tendered than usual;" *Peet v. Chicago*, etc., R. Co., 20 Wis. 594.

93. *St. Louis, I. M. & S. Ry. Co. v. State*, 84 Ark. 150, 104 S. W. 1106; *R. H. Oliver & Son v. Chicago, R. I. & P. Ry. Co.*, 89 Ark. 466, 117 S. W. 238; *E. R. Darlington Lumber Co. v. Missouri Pac. Ry. Co.*, 216 Mo. 658, 116 S. W. 530; *Michigan Cent. R. Co. v. Burrows*, 33 Mich. 6; *Branch v. Wilmington*, etc., R. Co., 77 N. C. 347; *Chicago*, etc., R. Co. v. *Thrapp*, 5 Ill. App. 502; *Illinois Cent. R. Co.*

v. *Cobb*, 64 Ill. 128; *Redman Rys.* (2nd ed.), 14; *Wallace v. Great Southern*, etc., R. Co., 17 W. R. 464.

94. *International*, etc., R. Co. v. *Young* (Tex. Civ. App.), 28 S. W. 819; *Atlantic Coast Line R. Co. v. Geraty*, 166 Fed. 10, 91 C. C. A. 602, 20 L. R. A. (N. S.) 310.

95. *State v. Missouri Pac. R. Co.*, 29 Neb. 550, 42 Am. & Eng. R. Cas. 261; *State v. Republican Valley R. Co.*, 17 Neb. 647, 52 Am. Rep. 424, 22 Am. & Eng. R. Cas. 500. But see *State v. Chicago*, etc., R. Co., 36 Minn. 402, wherein such a statute was held unconstitutional.

96. *Stock Yards Co. v. Louisville*, etc., R. Co., 67 Fed. Rep. 35, 31 U. S. App. 232.

viding additional tracks and warehouses to accommodate increased business,⁹⁷ and to constructing a side track and switch where necessary.^{97a} But railroad companies are not bound to be prepared for unusual and extraordinary contingencies which no ordinary prudence or foresight could reasonably anticipate, nor for an unusual influx of business which is not reasonably to be expected, nor for an accidental or extraordinary increase in the public demand for transportation which occurs without the fault of the company; they are, however, bound to provide ample facilities for transportation under all ordinary circumstances and conditions, and such as are adequate to business reasonably to be expected.⁹⁸ But it is

97. *Cobb v. Illinois Cent. R. Co.*, 38 Iowa, 671, whether the company has done all that is reasonable to accommodate its increased business, by increasing the number of its tracks and warehouses, is a question for the jury in a given case.

97a. *State White Oak Ry. Co.*, 65 W. Va. 15, 64 S. E. 630.

98. *N. Y.*—*Strough v. N. Y. Cent. & H. R. R. Co.*, 92 App. Div. (N. Y.) 584, 87 N. Y. Supp. 30, *affd.* 181 N. Y. 533, 73 N. E. 1133; *Wibert v. New York, etc., R. Co.*, 12 N. Y. 245, *affg.* 19 Barb. (N. Y.) 36, 29 Barb. (N. Y.) 635, cited 2 Sweeny (N. Y.), wherein it is held that the rule is true, notwithstanding the general railroad act of 1850, c. 140. § 36, requiring such companies to furnish sufficient facilities for the transportation of all freight offered; *Scoville v. Griffith*, 12 N. Y. 509; *Blackstock v. New York, etc., R. Co.*, 20 N. Y. 50, 1 Bosw. (N. Y.) 77, 75 Am. Dec. 372.

Ark.—*Midland Valley R. Co. v. Hoffman Coal Co.*, 91 Ark. 180, 120 S. W. 380; *St. Louis, I. M. & S. R. Co. v. Wynne Hoop & Cooperage Co.*, 81 Ark. 373, 99 S. W. 375.

Del.—*Truax v. Philadelphia, etc., R. Co.*, 3 Houst. (Del.) 233.

Ga.—*Southern Ry. Co. v. Atlanta Sand & Supply Co.*, 135 Ga. 35, 68 S. E. 807.

Ill.—*Cobb v. Illinois Cent. R. Co.*, 88 Ill. 394; *Galena, etc., R. Co. v. Rae*, 18 Ill. 488, 69 Am. Dec. 574.

Ind.—*Pittsburgh, etc., R. Co. v. Racer*, 5 Ind. App. 209.

Mich.—*Michigan Cent. R. Co. v. Burrows*, 33 Mich. 6.

Mass.—*Thayer v. Burchard*, 99 Mass. 508.

Miss.—*Vicksburg, etc., R. Co. v. Ragsdale*, 46 Miss. 458, 1 Am. Ry. Rep. 407.

Mo.—*Faulkner v. South. Pac. R. Co.*, 51 Mo. 311, 3 Am. Ry. Rep. 293; *Dawson v. Chicago, etc., R. Co.*, 79 Mo. 296, 18 Am. & Eng. R. Cas. 521; *Ballentine v. North Missouri R. Co.*, 40 Mo. 491, 93 Am. Dec. 315; *Cronan v. St. Louis & S. F. R. Co.*, 149 Mo. App. 384, 130 S. W. 437; *Shoptaugh v. St. Louis & S. F. R. Co.*, 147 Mo. App. 8, 126 S. W. 752.

S. C.—*Mauldin v. Seaboard Air Line Ry.*, 73 S. C. 9, 52 S. E. 677.

Tenn.—*East Tennessee, etc., R. Co. v. Nelson*, 1 Coldw. (Tenn.) 276.

Tex.—*Houston, etc., R. Co. v.*

no defense to an action against a railway company, for its breach of an express contract, to furnish cars for transportation of cattle at a given date, that the shipment of cattle over its line at the agreed time was so great that it did not have enough cars to enable it to comply with the contract;⁹⁹ and in the absence of contract, when the property consists of live stock, which are peculiarly liable to suffer injury by being delayed, an unusual pressure of business will not excuse the carrier unless a very strong case is made out, it being its duty to give such property the preference in transportation.¹ That press of business or other similar causes prevent the carrier from furnishing proper facilities is a matter of affirmative defense.² In the absence of special contract there is no absolute duty resting upon a railroad carrier to deliver the goods intrusted to it within what, under ordinary circumstances, would be a reasonable time. Not only storms and floods and other natural causes may excuse delay, but also the conduct of men may do so. An incendiary may burn down a bridge, a mob may tear up the tracks, or disable the rolling stock, or interpose irresistible force or overpowering intimidation, or the unlawful and violent conduct of strikers, after they have left the employ of the company, may cause delay in the transportation of property, and in such cases the only duty resting upon the carrier, not otherwise in fault, is to use reasonable efforts and due diligence to overcome the obstacles thus interposed, and to forward the goods to their destination.³ So, when the road is under military control;⁴ or

Smith, 63 Tex. 322, 22 Am. & Eng. R. Cas. 421.

U. S.—*Helliwell v. Grand Trunk R. Co.*, 10 Biss. (U. S.) 170, 7 Fed. Rep. 68; *Bussey v. Memphis, etc., R. Co.*, 4 McCrary (U. S.), 405, 13 Fed. Rep. 330; *Thomas v. Wabash, etc., R. Co.*, 63 Fed. Rep. 200; *Marine Ins. Co. v. St. Louis, etc., R. Co.*, 41 Fed. Rep. 643, 43 Am. & Eng. R. Cas. 79.

Compare Louisville, etc., R. Co. v. Touart, 97 Ala. 514, 55 Am. & Eng. R. Cas. 600.

99. *Gulf City, etc., R. Co. v. Hodge* (Tex. Civ. App.), 30 S. W. 829; *Gulf, etc., R. Co. v. Hume*, 6 Tex. Civ. App. 653, 87 Tex. 211, 27 S. W. 110;

Cross v. McFadden, 1 Tex. Civ. App. 461; *International, etc., R. Co. v. Anderson*, 3 Tex. Civ. App. 8. See *Liability for delay*, chap. 8, § 1.

1. *Gulf, etc., R. Co. v. McAuley* (Tex. Civ. App.), 26 S. W. 475; *International, etc., R. Co. v. Lewis* (Tex. Civ. App.) 23 S. W. 323. See *Liability for delay*. *Perishable freights*, chap. 8, § 7.

2. *Chicago, etc., R. Co. v. Wolcott*, 141 Ind. 267.

3. *Geismer v. Lake Shore, etc., R. Co.*, 102 N. Y. 563, 55 Am. Rep. 837, revg. 34 Hun (N. Y.), 50; *Louisville, etc., R. Co. v. Queen City Coal Co. (Ky.)*, 35 S. W. 626. See cases

when the carrier is without fault;⁵ or there is a wreck on the track.⁶ It is the duty of the carrier, when unable in any case, from any cause, to transport goods offered for carriage, to give notice to the consignor before accepting the goods, so that the latter may take a different course if he desire to;⁷ but whether such an obligation arises, where the difficulty or obstacle occurs on a connecting line, instead of on the carrier's own line, has been questioned.⁸ If its inability to transport goods is known to the carrier or its agents at the time it accepts the goods, it is liable and is not excusable for delay, unless the shipper was notified or consented to the delay;⁹ but the rule is held otherwise in some jurisdictions.¹⁰ A railroad company has no right to discriminate

cited *Liability for delay, Strikes by employees*, chap. 8, § 14.

4. *Illinois Cent. R. Co. v. McClellan*, 54 Ill. 58, 5 Am. Rep. 83; *Illinois Cent. R. Co. v. Phelps*, 4 Ill. App. 238. See also, *Excuses for delay* generally, chap. 8, § 10.

5. *Michigan Cent. R. Co. v. Burrows*, 33 Mich. 6; *International, etc., R. Co. v. Hynes*, 3 Tex. Civ. App. 20; *Taylor v. Great Northern R. Co.*, L. R. I. C. P. 385.

6. *Newport News, etc., R. Co. v. Mercer*, 96 Ky. 475.

7. *Guinn v. Wabash, etc., R. Co.*, 20 Mo. App. 453; *Faulkner v. Southern Pac. R. Co.*, 51 Mo. 311; *Illinois Cent. R. Co. v. Cobb*, 64 Ill. 140; *Great Western R. Co. v. Burns*, 60 Ill. 284; *Helliwell v. Grand Trunk R. Co.*, 10 Biss. (U. S.) 170, 7 Fed. Rep. 68; *Bussey v. Memphis, etc., R. Co.*, 13 Fed. Rep. 330.

A carrier, on having reason to anticipate inability to furnish cars after receipt of notice therefor, must advise the shipper in order to excuse itself from liability for failure to furnish cars. *Di Giorgio Import-*

ing & Steamship Co. v. Pennsylvania R. Co., — Md. —. 65 Atl. 425.

8. *Peet v. Chicago, etc., R. Co.*, 20 Wis. 594, 91 Am. Dec. 446; *McCarthy v. Terre Haute, etc., R. Co.*, 9 Mo. App. 159. See also, cases cited in note 84 following.

9. *Dillender v. St. Louis & S. F. R. Co.*, 149 Mo. App. 331, 130 S. W. 107; *International, etc., R. Co. v. Anderson*, 3 Tex. Civ. App. 8, and other cases cited, *supra*. *Tierney v. New York Cent., etc., R. Co.*, 76 N. Y. 305, affg. 10 Hun (N. Y.), 569, 67 Barb. (N. Y.) 538. See also, *Wibert v. New York, etc., R. Co.*, 12 N. Y. 245, 19 Barb. (N. Y.) 36.

10. *Peet v. Chicago, etc., R. Co.*, 20 Wis. 594, 91 Am. Dec. 446, "if the shipper has not all the information he desires as to the causes or circumstances which will expedite or delay the delivery of the goods, it would be more reasonable that he should make inquiry than to impose on the company or its agents the duty of giving unasked a statement of such circumstances." *Galena, etc., R. Co. v. Rae*, 18 Ill. 488, 68 Am. Dec. 574; *Thayer v. Burchard*, 99 Mass. 508.

and store freight received for transportation from one person, on the ground that it has not facilities to forward it, and in the meantime forward new and subsequent freight received from another;¹¹ nor to discriminate in favor of one shipper in providing cars, where the demands exceed its capacity and the anticipated calls upon it;¹² but it may discriminate in favor of perishable goods, when there is an unusual press of business.¹³ Where there is a general shortage of cars and locomotives, but the carrier has exercised diligence to provide adequate equipment for its business, a shipper is only entitled to a just division of the empty cars that should have been apportioned to the station from which he ships his goods.¹⁴ The obligation of a carrier to furnish cars may either be imposed by law or arise from a special contract between the parties.¹⁵ In the absence of statutory provision, a carrier's location of necessary stations and facilities is somewhat discretionary with it.¹⁶

A carrier is not required to keep a car equipment sufficiently extensive for maximum freight output at any time of the year, but only to meet a demand so adjusted as to utilize the equipment with regularity throughout the year.¹⁷ Under the common law, the Kentucky statute and Interstate Commerce Act, § 1, a common carrier is under the legal duty, subject to certain exceptions, to furnish to shippers, when seasonably requested, sufficient cars and equipment to carry all the freight offered.¹⁸ The statute requiring

11. *Great Western R. Co. v. Burns*, 60 Ill. 284; *Truax v. Philadelphia, etc., R. Co.*, 3 *Houst. (Del.)* 233. See also, *Discrimination in charges or facilities*, § 16, *post*. *Acheson v. New York Cent., etc., R. Co.*, 61 N. Y. 652, where the goods were not sent forth in their regular order the question was one of fact for the jury.

12. *Strough v. New York Cent. & H. R. R. Co.*, 92 App. Div. 584, 87 N. Y. Supp. 30, *affd.* 181 N. Y. 533.

13. *Tierney v. New York Cent., etc., R. Co.*, 76 N. Y. 305; *Peet v. Chicago, etc., R. Co.*, 20 Wis. 594. See *Swetland v. Boston & Albany R.*

Co., 102 Mass. 276, holding that the carrier is not bound to give such preference. See also, *Liability for delay, Perishable freights*, chap. 8, § 7.

14. *State v. Chicago & N. W. R. Co.*, 83 Neb. 518, 120 N. W. 165.

15. *Chattanooga Southern R. Co. v. Thompson*, 133 Ga. 127, 65 S. E. 285.

16. *Chicago, etc., R. Co. v. Baugh*, 175 Ind. 419, 94 N. E. 571.

17. *Montana, etc., R. Co. v. Morley*, 198 Fed. 991.

18. *Illinois Cent. R. Co. v. River & Rail Coal & Coke Co.*, 150 Ky. 489, 150 S. W. 641, a railroad company, engaged in the coal carrying trade is

carriers to furnish, without discrimination or delay, sufficient facilities for the carriage of freight does not make the duty an absolute one, and does not require the carrier to provide in advance for an unprecedented and unexpected rush of business.¹⁹ If a carrier agrees to have freight cars ready at a particular time, it is bound to perform such agreement notwithstanding accident or delay by inevitable necessity.²⁰ A contract between a railroad company and a lumber company for a construction of a switch track on the railroad's right of way was held not to give the lumber company an exclusive privilege of the switch track; and the carrier may not refuse to furnish cars on such track to another shipper.²¹ At common law a common carrier, receiving grain or produce for shipment in bulk, is bound to furnish cars equipped with grain doors or bulkheads rendering the car safe and suitable for the purpose intended.²² A carrier must exercise reasonable diligence to furnish cars adequate for the transportation of freight, and not discriminate in favor of one shipper when the demand exceeds the capacity of the carrier and the anticipated and ordinary calls on it.²³ If one contracted to deliver two cars to another at a certain place, and did not so deliver them by reason of a shortage in the cars at the time, the fact of such shortage would not relieve him from performance of the contract, whether known to the other party or not.²⁴ A railroad company must furnish

required to have a sufficient supply of cars to meet the normal demands of that trade during the fall and winter months when the normal demand is heaviest.

19. *Cumbe v. St. Louis, etc., Ry. Co.*, — Ark. —, 151 S. W. 240.

20. *Dallenbach v. Illinois Cent. R. Co.*, 164 Ill. App. 310.

In the absence of an agreement to provide cars at a particular time, a carrier is only obligated to exercise due diligence to furnish freight cars within a reasonable time.

21. *Southern Ry. Co. in Miss. v. Mather-McDowell Lumber Co.*, — Miss. —, 60 So. 42.

22. *Loomis v. Lehigh Valley R. Co.*,

208 N. Y. 312, 101 N. E. 907, modifying 147 App. Div. 195, 132 N. Y. Supp. 138.

23. *Dobbins v. Syracuse, etc., R. Co.*, 141 N. Y. Supp. 637.

Where a shipper honestly attempted to procure cars for transportation of perishable freight, and the carrier refused reasonable demands for cars, and cars were furnished competing shippers, the shipper could recover for the refusal to furnish cars, and the fact that he held the goods for speculative purposes was immaterial. *Id.*

24. *Williams v. Armour Car Lines*, 7 Penn. (Del.) 275, 79 Atl. 919.

necessary cars to transport freight offered it; but, when the carrier has furnished itself with the appliances necessary for that purpose in the usual course of events, taking into consideration the fact that at certain seasons more cars are needed, it has fulfilled its duty, and will not be required to provide for such a rush of grain as may only occur in any given locality temporarily or at long intervals of time.²⁵

§ 9. Failure or refusal to furnish facilities for transportation.

A common carrier is under a legal duty to supply patrons with cars to promptly move such freight as may be expected, according to the usual volume of business offered for shipment, and if timely demands are made for cars, and the carrier fails to furnish them, without lawful excuse, it is answerable for the proximate damage sustained by the shipper.²⁶ Where the usual course of business has been for a railroad to furnish cars at a shipper's warehouse, the shipper may demand cars for its use, giving reasonable notice of its requirements, and may recover in case of a wrongful refusal or neglect to furnish the cars.²⁷ Where a shipper demands cars at its warehouse for the transportation of goods, the fact, particularly when communicated to the carrier, that the goods to be shipped are prepared for and immediately available for shipment is a sufficient tender to the carrier.²⁸ The mere fact that a commodity intended to be shipped is not on the platform of the carrier is not an excuse for the carrier's failure to furnish cars, when the commodity is under the control of the shipper, and ready for shipment in the usual way.²⁹ Damages for breach of a carrier's ex-

25. *State v. Chicago, etc., R. Co.*, 71 Neb. 593, 99 N. W. 309.

During a temporary scarcity of cars a railroad company is entitled to consider, in apportioning them among grain dealers, their relative volume of business; and, though there may be a difference in the number furnished to different grain dealers at the same station, still, if no discrimination is shown, no shipper has a right to complain, though he may not obtain all the cars he deems necessary. *Id.*

26. *Cronan v. St. Louis & S. F. R. Co.*, 149 Mo. App. 384, 130 S. W. 437.

27. *Richey & Gilbert v. Northern Pac. Ry. Co.*, 110 Minn. 347, 125 N. W. 897.

28. *Richey & Gilbert v. Northern Pac. Ry. Co.*, 110 Minn. 347, 125 N. W. 897.

29. *St. Louis S. W. Ry. Co. v. Leder Bros.*, 87 Ark. 298, 112 S. W. 744.

A complaint in an action against

press contract to furnish cars at a specified time are recoverable in an action on the contract; but, in the absence of an express contract, the proposing shipper has no action save for a breach of the carrier's general common law duty to furnish cars within a reasonable time.³⁰ Where the capacity of a carrier is not overtaxed, a shipper demanding cars need not, in order to recover for failure to furnish cars, give notice to the carrier of the danger of the goods becoming injured unless shipped without delay.³¹ In an action for the failure of a carrier to furnish cars, the fact that, after the damages sued for had accrued, the shipper and the carrier entered into a contract for the shipment of the freight, did not affect the shipper's right to recover the damages sustained.³² Where there is no sufficient notice to furnish cars for the transportation of perishable freight, the carrier is not liable for loss sustained by deterioration of the goods due to the delay in transportation.³³ In an action against a carrier for breach of its common law duty to furnish cars to transport freight without unreasonable delay, a standing order of the shipper for five cars a day was too indefinite to be the basis of an action for damages for failure to furnish them.³⁴ A common carrier holding itself out to the pub-

a railroad for failure to furnish cars is demurrable where it failed to show a demand on a person authorized to furnish cars. *St. Louis, etc., R. Co. v. Moss*, 75 Ark. 64, 86 S. W. 828.

30. *Central of Ga. Ry. Co. v. Sigma Lumber Co.*, 170 Ala. 627, 54 So. 205.

31. *Hoffman Heading & Stave Co. v. St. Louis, etc., R. Co.*, 119 Mo. App. 495, 94 S. W. 597.

32. *St. Louis, etc., R. Co. v. Taylor*, 87 Ark. 331, 112 S. W. 745.

33. *Di Giorgio Importing & Steamship Co. v. Pennsylvania R. Co.*, — Md. —, 65 Atl. 425.

34. *Simmons v. Seaboard Air Line Ry.*, 133 Ga. 635, 66 S. E. 783.

Petition in such an action held sufficient as against a general demurrer. *Southern Ry. Co. v. Moore*, 133 Ga. 806, 67 S. E. 85.

The "Reciprocal Demurrage Act" of 1905 is applicable only where the gist of plaintiff's claim is based on violation of the carrier's public duty, irrespective of contract. *Georgia Coast & P. R. Co. v. Durrence & Sands*, 6 Ga. App. 615, 65 S. E. 583.

Discontinuance of switching practice.—That a railroad company had been accustomed in behalf of a firm to switch to its side track, to be unloaded by the consignees, cars of ice brought to destination by another railroad company, did not make the former liable in damages for refusal to continue the practice, with or without notice that the practice would be discontinued, where it did not appear that because of the practice, and a belief that it would be continued, the firm did something

lie as ready to do switching has no right to discontinue switching cars, for a shipper on the ground of his refusal to pay bills for car service, when a detention for which the charges were assessed was occasioned as much by the fault of the carrier as by the fault of the shipper.³⁵ A common carrier is liable to a shipper, for the failure to furnish cars, for such actual damages as were sustained by reason of any failure or default on its part to deliver the cars as requested.³⁶ Under the Illinois Railroad Act, § 84, providing that every railroad corporation in the State shall furnish cars for the transportation of such passengers and property as shall within a reasonable time previous thereto be ready or offered for transportation at the several stations of the railroad, if the merchandise to be shipped is substantially ready for shipment at the time the order for cars is placed, the statute is complied with, and a failure to furnish the cars confers a right of action upon the shipper.³⁷ In an action against a carrier for failure to furnish cars after demand, as required by the Texas statute, an answer failing to allege facts showing that the carrier had performed its duty of providing a sufficient number of cars to meet the ordinary needs of its business, which it could reasonably anticipate, or that the scarcity of cars and existing demands for them were the result of circumstances beyond its power reasonably to control and provide against, is demurrable.³⁸ After a railroad company has re-

by which it suffered injury on a discontinuance of the practice without reasonable notice, and that no such notice was given. *Western & A. R. Co. v. Haig & Puryear*, 136 Ga. 494, 71 S. E. 792.

35. *Larabee Flour Mills Co. v. Missouri Pac. Ry. Co.*, — Kan —, 88 Pac. 72.

36. *Yazoo & M. V. R. Co. v. Fisher Bros.*, — Miss. —, 59 So. 877.

The fixing of delayage charges by the Railroad Commission for failure of a carrier to furnish cars does not deprive the shipper of his right to damages under the common law. *Id.*

37. *Mulberry Hill Coal Co. v. Illi-*

nois Cent. R. Co., 161 Ill. App. 272.

As to construction and effect of former statutes, see *Atchison, etc., R. Co. v. People*, 227 Ill. 270, 81 N. E. 342, revg. judg. 128 Ill. App. 38.

38. *Allen v. Texas & P. Ry. Co.*, 100 Tex. 525, 101 S. W. 792, revg. judg.; *Texas & P. Ry. Co. v. Allen* (Civ. App.), 98 S. W. 450.

No recovery can be had under the petition of a shipper against a carrier for delay in furnishing cars for a shipment as ordered, where the carrier furnished cars pursuant to such order, though tardily. *Southern Kansas Ry. Co. of Texas v. Cox* (Tex. Civ. App.), 103 S. W. 1122.

fused to furnish transportation to the shipper, the latter is not bound to prepare and offer his freight, in order to become entitled to damages for the refusal.³⁹ A railroad company is not bound to keep suitable cars constantly on hand at all stations for the use of shippers, but is entitled to reasonable time in which to furnish them after requisition is made by the shipper.⁴⁰

§ 10. Special contracts for means of transportation.

A common carrier is bound, by reason of its general relation to the public, to furnish suitable cars on reasonable notice whenever it can do so with reasonable diligence, without jeopardizing its other business. And, when sued for a failure to furnish cars on request, on it is the burden of excusing itself.⁴¹ But a carrier is relieved from liability for a failure to furnish cars, when it has sufficient cars to meet all ordinary demands, and an unusual demand has put all its cars in use, rendering it unable to furnish those demanded, and it furnishes them as soon as it can with due regard to the rights of other shippers, who had previously or at the same time demanded transportation.⁴² Damages may be recovered for the breach of a special verbal contract to furnish cars for transportation at a specified time;⁴³ and when a carrier is informed of the special circumstances making it advantageous to the plaintiff to get his produce to market on a certain day, and agrees to furnish cars to be loaded in time to be forwarded to such market on that day, which contract he fails to perform, the plaintiff is entitled to recover such special damages as actually result from the failure to get the produce to market on that day.⁴⁴

39. *Houston, etc., R. Co. v. Campbell*, 91 Tex. 551, 45 S. W. 2, 43 L. R. A. 235, and where the shipper lost the benefit of a sale by the refusal of the company to furnish cars in which to ship the goods, it is immaterial whether the company had knowledge of the contract of sale.

40. *Huston v. Wabash R. Co.*, 63 Mo. App. 671, 2 Mo. App. Repr. 941.

41. *Ayers v. Chicago, etc., Ry. Co.*, 71 Wis. 372, 5 Am. St. Rep. 226, 35 Am. & Eng. R. Cas. 679; *Di Giorgio*

Importing & Steamship Co. v. Pennsylvania R. Co., — Md. —, 65 Atl. 525.

42. *Pittsburgh, etc., R. Co. v. Racer*, 5 Ind. App. 209, 31 N. E. 853.

43. *Missouri, etc., R. Co. v. Graves* (Tex. Civ. App.), 16 S. W. 102; *Cross v. Graves*, 4 Tex. Civ. App. Cas. § 99.

44. *Hamilton v. Western North Carolina R. Co.*, 96 N. C. 398, 30 Am. & Eng. R. Cas. 1.

Where there is a special contract, the obligations of the carrier are determined by the provisions of the contract itself, and when the carrier is not required by the contract or order to furnish the cars at any certain hour of the day named, it may furnish them at any hour of the day it sees fit.⁴⁵ A station agent for a railroad company has authority to make a special contract binding on the company, to furnish cars at the station for shipment on a specified day.⁴⁶ Where there is a special contract and an absolute engagement to furnish cars or deliver goods at a certain time, the carrier is held to a strict performance of the contract, and unusual pressure of business, temporary obstruction or other causes, or even unavoidable accident or absolute impossibility by reason of an act of God or otherwise, will not be a defense to an action for failure or breach of the contract, unless allowable expressly or by implication from the terms of the contract itself.⁴⁷ Where a railroad company contracted to furnish a shipper a certain number of cars of a certain kind at a specified time, but it was understood that such order was merely an expression of preference, and that the shipper would accept any variety of cars he could get, if the kind he ordered were not obtainable, the company was not absolved from the duty to furnish cars at the required time by inability to obtain the precise kind ordered.⁴⁸ A carrier is not re-

45. *McGrew v. Missouri Pac. R. Co.*, 109 Mo. 582; *Morehouse v. Texas Trunk R. Co.*, 4 Tex. Civ. App. Cas. § 266, also holding that the date of the contract is immaterial, and although the declaration may allege a contract made on a particular day, it is error to exclude proof of a contract made on a different day.

46. *Easton v. Dudley*, 78 Tex. 236, 45 Am. & Eng. R. Cas. 340, 14 S. W. 583; *McCarthy v. Gulf, etc., R. Co.*, 79 Tex. 33, 15 S. W. 164; *Missouri etc., R. Co. v. Graves* (Tex. Civ. App.), 16 S. W. 102; *Gulf, etc., R. Co. v. Hume* (Tex.), 27 S. W. 110, revg. 24 S. W. 915, 6 Tex. Civ. App. 653. See also *Authority of carrier's agents*, chap. 11.

47. *Deming v. Grand Trunk R. Co.*, 48 N. H. 455; *Gulf, etc., R. Co. v. Hume* (Tex.), 27 S. W. 110, revg. 24 S. W. 915, 6 Tex. Civ. App. 653; *Cross v. McFaden*, 1 Tex. Civ. App. 461; *Gulf, etc., R. Co. v. McCorquedale*, 71 Tex. 41, 35 Am. & Eng. R. Cas. 653; *Jemison v. McDaniel*, 25 Miss. 83; *Atkinson v. Ritchie*, 10 East, 530, *Spence v. Chodwick*, 10 Q. B. 517, 59 E. C. L. 517, 11 Jur. 872; *Baily v. DeCrespigny*, L. R. 4 Q. B. 186; *Pollock*, Cont. 366. See also *Gann v. Chicago, etc., R. Co.*, 2 Mo. App. Rep. 1288; *Williams v. Armour Car Lines*, 7 Penn. (Del.) 275, 79 Atl. 919.

48. *Nichols v. Oregon Short Line R. Co.* (Utah), 66 Pac. 768.

lieved from liability for breach of its contract to furnish cars, though at the date of and during the time covered by the contract it did not have or own any cars.⁴⁹ In order to make a contract binding on the carrier there must be a corresponding obligation on the part of the shipper to perform the contract on his part, a mutuality of agreement, a consideration for the carrier's agreement in the payment of money, or the expenditure of labor, or the performance of some service, on the faith of the contract.⁵⁰ So, of a contract or option to transport goods within the time and quantity and to whatever place desired by the shipper, the shipper having his election not to require the transportation of any, or the privilege of determining the place.⁵¹ Whether or not a special contract exists must often be determined from the circumstances of a given case, and the evidence must be sufficient to establish all the essential elements of such an agreement.⁵² There is a contract of carriage, on a sufficient consideration, where defendant railroad company, to induce plaintiff to buy ice, promised him to transport it from where it was to a certain point for a certain amount per ton, and on the faith of that promise he bought it.⁵³ An oral contract to provide transportation on a certain day is not, after breach and damages, abrogated by the terms of a bill of lading issued when the freight was subsequently shipped, or merged

49. *Baxley v. Tallassee, etc., R. Co.* (Ala.), 29 So. 451.

50. *Chicago, etc., R. Co. v. Dane*, 43 N. Y. 240; *Riggins v. Missouri River, etc., R. Co.*, 73 Mo. 598, 9 Am. & Eng. R. Cas. 242; *Tilley v. Cook County*, 103 U. S. 155; *Louisville, etc., R. Co. v. Flanagan*, 113 Ind. 488, 3 Am. St. Rep. 674, 32 Am. & Eng. R. Cas. 535; *Laboyteaux v. Swigart*, 103 Ind. 596; *Pittsburgh, etc., R. Co. v. Hollowell*, 65 Ind. 188; *Missouri Pac. R. Co. v. Texas, etc., R. Co.*, 31 Fed. Rep. 864.

The mere promise by a carrier to ship certain freight at a certain rate does not constitute a contract on which an action can be based, unless the shipper accepts the offer by agree-

ing to ship the goods at such rate. *Southern Ry. Co. v. Wilcox*, 99 Va. 394, 3 Va. Sup. Ct. Rep. 321, 39 S. E. 144.

51. *Chicago, etc., R. Co. v. Dane*, 43 N. Y. 240; *Cleveland, etc., R. Co. v. Clossar*, 126 Ind. 348, 22 Am. St. Rep. 593, 45 Am. & Eng. R. Cas. 275; *White v. Missouri Pac. R. Co.*, 19 Mo. App. 400.

52. *Toledo, etc., R. Co. v. Roberts*, 71 Ill. 540; *Reed v. Philadelphia, etc., R. Co.*, 3 Houst. (Del.) 176; *Truax v. Philadelphia, etc., R. Co.*, 3 Houst. (Del.) 233; *Baker v. Kansas City, etc., R. Co.*, 91 Mo. 152, 28 Am. & Eng. R. Cas. 61.

53. *Bigelow v. Chicago, etc., R. Co.*, 104 Wis. 109, 80 N. W. 95.

in a subsequent written contract of shipment duly performed, so as to deprive the shipper of his right to recover damages for the breach.⁵⁴ The mere receipt of a bill of lading does not affect a prior contract, under which goods have been actually shipped and are in course of transit, without an actual consent to the change.⁵⁵

§ 11. Duty to furnish facilities declared by statute.

Where a statute provides that in case of refusal by a common carrier "to take and transport any passenger or property, or to deliver the same, or either of them, at the regular or appointed time, such corporation shall pay to the party aggrieved all damages which shall be sustained thereby, with costs of suit," the carrier is liable for receiving the goods of one shipper after rejecting those of a prior applicant. It is held that such a provision is "merely declaratory of the common law;" that, aside from the statute, "it would be the duty of the carrier to provide all necessary facilities and means for transporting such property as might be offered, at least to the extent that would ordinarily be expected to seek transportation by the particular line."⁵⁶ Under such a statute, it is sufficient to allege the refusal to furnish cars for the transportation whereby plaintiff sustained a loss, but under a statute imposing a penalty for a railway company's refusal to transport and deliver freight, upon a written demand for the cars and the tendering of freight charges, a petition is insufficient which does not allege such facts bringing the case clearly within the terms of the statute.⁵⁷ And an answer failing to allege facts

54. *Hamilton v. Western North Carolina R. Co.*, 96 N. C. 398, 10 Am. & Eng. R. Cas. 1; *McAbsher v. Richmond, etc., R. Co.*, 108 N. C. 344, 55 Am. & Eng. R. Cas. 324. See also *San Antonio, etc., R. Co. v. Avery*, 19 Tex. Civ. App. 235, 46 S. W. 897; *San Antonio, etc., R. Co. v. Wright*, 20 Tex. Civ. App. 136, 49 S. W. 147.

55. *Farmers' Loan & Trust Co. v. Northern Pac. R. Co.* (U. S. C. C. A. N. Y.), 120 Fed. 873, 57 C. C. A. 533, revg. 112 Fed. 829.

56. *Houston, etc., R. Co. v. Smith*,

63 Tex. 322, 22 Am. & Eng. R. Cas. 452.

57. *Galveston, etc., R. Co. v. Schmidt* (Tex. Civ. App.), 25 S. W. 452.

Payment or tender of freight when goods are offered for shipment and cars demanded is not a condition precedent to recovery from a carrier for refusal to furnish cars, and for increased freights demanded after such offer of goods, where the carrier requires payment only before delivery to the consignee. *Chicago, etc.,*

showing that the carrier had performed its duty of providing a sufficient number of cars to meet the ordinary needs of its business, which it could reasonably anticipate, or that the scarcity of cars and the existing demands for them were the result of circumstances beyond its power reasonably to control and provide against is demurrable.⁵⁸ But a statute, which provides for treble damages for the failure of a railroad company to furnish cars for transportation of such property as shall within a reasonable time previous thereto be ready or be offered for transportation, was held not to apply to a failure to furnish cars at a mine for coal to be dug and hoisted after the cars are furnished.⁵⁹ A statute requiring every railroad corporation to provide facilities for receiving and handling freight, under a penalty imposed for refusal, was held to apply, where a railroad corporation required all grain to be delivered to a particular warehouseman to store and handle, and refused to furnish cars at any other warehouse.⁶⁰ A right of action against a carrier under a statute for refusal to furnish cars to a shipper, constituting discrimination in favor of other shippers, being for damages to property and not to person, is assignable.⁶¹ Under the Wisconsin statute relating to railroad companies as carriers, requiring them to furnish suitable cars, on reasonable notice, when within their power, it has been held that the complaint must aver reasonable notice, and that it was within the power of the company at any time to furnish suitable cars.⁶² Under the New

R. Co. v. Wolcott, 141 Ind. 267, 61 Am. & Eng. R. Cas. 135, 39 N. E. 451.

58. Allen v. Texas & P. Ry. Co., 100 Tex. 525, 101 S. W. 792, revg. Texas & P. Ry. Co. v. Allen, 98 S. W. 450.

The right to limit the use of cars to shipments inside the State must be asserted at the time the cars are furnished in order to excuse the carrier for failing to furnish cars within the required time after demand as required by statute. Houston & T. C. R. Co. v. Buchanan, 38 Tex. Civ. App. 166, 84 S. W. 1073.

59. Illinois, etc., R. Co. v. People, 19 Ill. App. 141; People v. Illinois, etc., R. Co., 122 Ill. 506. See Atchison, T. & S. F. Ry. Co. v. People, 227 Ill. 270, 81 N. E. 342, revg. 128 Ill. App. 38, wherein the section of the Illinois statute providing for treble damages is held to be a penal statute and must be strictly construed.

60. Rhodes v. Northern Pac. R. Co., 34 Minn. 87, 21 Am. & Eng. R. Cas. 31.

61. Chicago, etc., R. Co. v. Wolcott, 141 Ind. 267, 61 Am. & Eng. R. Cas. 135, 39 N. E. 451.

62. Richardson v. Chicago, etc., R. Co., 61 Wis. 596, 18 Am. & Eng. R.

Hampshire statute, providing that every railroad company shall furnish to all persons reasonable and equal terms, facilities and accommodations for the transportation of property, it has been held that it is the duty of a common carrier of milk to provide reasonable facilities for its reception and delivery and care, including care during transportation, and where it is more advantageous to producers, distributors, and consumers to have it transported in special cars furnished with icing facilities than in ordinary cars, it is the duty of the carrier to furnish such cars.⁶³ A statute imposing a penalty upon railroad companies for failure to furnish freight cars, after demand therefor in writing, does not abrogate the common law right to recover from a company damages caused by its breach of a verbal contract to furnish cars.⁶⁴ A railroad company which fails to furnish sufficient accommodations, within a reasonable time, for the shipment of cattle offered to it for transportation by one who pays or satisfies the company for the freight, is liable to the shipper for all damages sustained thereby, with costs of suit, under a statute requiring such facilities to be so furnished; and the mere fact that an unusually large number of cattle are being transported over the railroad at the time the cattle are offered for shipment does not, as matter of law, excuse the company for failure to furnish a sufficient number of cars for the shipment of those offered.⁶⁵ The English Railway

Cas. 530; *Ayres v. Chicago, etc., R. Co.*, 71 Wis. 372, 5 Am. St. Rep. 226, 35 Am. & Eng. R. Cas. 679.

63. *Baker v. Boston & M. R. Co.*, 74 N. H. 100, 65 Atl. 386.

64. *Missouri Pac. R. Co. v. Harmonson*, 4 Tex. Civ. App. Cas. § 91, 16 S. W. 539; *Missouri, etc., R. Co. v. Graves* (Tex. App.), 16 S. W. 102; *Cross v. Graves*, 4 Tex. Civ. App. Cas. § 99; *Texas Pac. R. Co. v. Nicholson*, 61 Tex. 491, 21 Am. & Eng. R. Cas. 133; *Texas, etc., R. Co. v. Hamm*, 2 Tex. Civ. App. Cas. § 490; *San Antonio, etc., R. Co. v. Bailey*, 4 Tex. Civ. App. Cas. § 67.

An application to a station agent

for cars, under a statute requiring the application to be made to the superintendent or person in charge of transportation, is sufficient. *Easton v. Dudley*, 78 Tex. 239, 45 Am. & Eng. R. Cas. 340; *Austin, etc., R. Co. v. Slator*, 7 Tex. Civ. App. 344; *McCarty v. Gulf, etc., R. Co.*, 79 Tex. 33, 15 S. W. 164; *Missouri, etc., R. Co. v. Graves* (Tex. App.), 16 S. W. 102; *Houston & T. C. R. Co. v. Mayes* (Tex. Civ. App.), 83 S. W. 53.

65. *Davis v. Texas & P. R. Co.*, 91 Tex. 505, 10 Am. & Eng. R. Cas. N. S. 301, 44 S. W. 822, rev. 42 S. W. 1008.

and Canal Traffic Act, which declares the duties and obligations of all public carriers and provides for the appointment of a board of commissioners to secure their enforcement, requires all railway and canal companies, according to their respective powers, to afford all reasonable facilities for receiving, forwarding, and delivering traffic, and to give no undue preference or advantage to or in favor of any person or company. This statute has been held to give power to compel a railroad company to so use and manage its stations and works, and so conduct its business, as to afford accommodations reasonably expected of it with the means at its disposal for receiving, forwarding, and delivering traffic, and possibly even to the extent of determining the number of trains to be run, or the time of departure or the like, but not to compel the company to execute new or improved structural works;⁶⁶ and further that in order to induce the interference of the court on a question of "reasonable facilities" it is necessary to show a public inconvenience, and not merely an individual grievance.⁶⁷ The statute was designed mainly to afford a remedy against undue preferences in respect to traffic and was not intended to apply to the case of a breach or neglect by the company of a public duty, which was already susceptible of redress by mandamus or indictment, and hence does not affect the common law remedies of shippers.⁶⁸ It has been held not to apply to special contracts entered into by a railroad covering traffic beyond the limits of its own line.⁶⁹

§ 12. Must furnish suitable and safe cars.

A common carrier is bound to furnish shippers suitable, safe, and secure cars in which to carry property delivered to it for transportation, and it is liable for any damages resulting from its failure to do so.⁷⁰ It has been held liable, in such cases, where

66. *South Eastern R. Co. v. Railway Com'rs*, 5 Q. B. Div. 217, 28 W. R. 464; *Caterham R. Co. v. London, etc., R. Co.*, 26 L. J. C. P. 161, 87 E. C. L. 410.

67. *Barrett v. Great Northern R. Co.*, 87 E. C. L. 423, 26 L. J. C. P. 83.

68. *Bennett v. Manchester, etc., R.*

Co., 95 E. C. L. 707, 6 C. B. N. S. 707.

69. *Zunz v. South Eastern R. Co.*, L. R. 4 Q. B. 539, 10 B. & S. 594.

70. *Terre Haute, etc., R. Co. v. Crews*, 53 Ill. App. 50; *Lyon v. Mells*, 5 East. 428; *Shaw v. York, etc., R. Co.*, 13 Q. B. 347, 66 E. C. L. 347;

cattle were injured from breaking out of a door defectively fastened;⁷¹ for the death of a horse caused by falling from a car, one of the doors of which could not be closed;⁷² where it furnished an unsuitable car for the shipment of meal, although the shipper examined the car and failed to discover anything uncleanly,⁷³ where a car furnished for the shipment of cattle was infected with germs of Texas fever;⁷⁴ for damages due to defects in a car specially adapted for the preservation of perishable property which it undertook to carry;⁷⁵ for grain injured by its failure to provide suitable cars, though the injury occurred on the road of a connecting carrier;⁷⁶ for the death of a shipper caused, while he was loading stock, by defect in a car and its appliances for loading;⁷⁷ for the damages plaintiffs were compelled to pay for the death of one of their employes, killed through the failure of defendant company to furnish a safe and proper car for plaintiff's use.⁷⁸ It has been held that a railway carrier is not, as a matter of law, bound to furnish refrigerator cars to carry perishable goods, and that whether it is negligence not to do so is a question for the jury;⁷⁹ and that a common carrier not bound to ship fruit in a special car, is not chargeable with negligence in forwarding it in an ordinary car while the temperature is so low that the fruit is frozen.⁸⁰ To the contrary, it has been held that, where no specific agreement is shown for any specific class of cars, and

The Caledonia, 43 Fed. Rep. 681, exceptions in a bill of lading do not affect the warranty of seaworthiness at the time of leaving port. See also cases cited in following notes under this section and Carriers of Live Stock.

71. *Terre Haute, etc., R. Co. v. Crews*, 53 Ill. App. 50.

72. *Root v. New York, etc., R. Co.*, 83 Hun (N. Y.), 111, 63 N. Y. St. Rep. 841, 31 N. Y. Supp. 357.

73. *Hunt v. Nutt* (Tex. Civ. App.), 27 S. W. 1031.

74. *St. Louis, etc., R. Co. v. Henderson*, 57 Ark. 402, 21 S. W. 878.

75. *Chicago, etc., R. Co. v. Davis*, 54 Ill. App. 130, *affd.* 159 Ill. 53, 2

Am. & Eng. R. Cas. N. S. 581, 42 N. E. 382.

76. *Alabama, etc., R. Co. v. Searles*, 71 Miss. 74, 16 So. 255.

77. *White v. Cincinnati, etc., R. Co.*, 89 Ky. 478, 42 Am. & Eng. R. Cas. 547.

78. *Hoosier Stone Co. v. Louisville, etc., R. Co.*, 131 Ind. 575, 55 Am. & Eng. R. Case. 643.

79. *Udell v. Illinois Cent. R. Co.*, 13 Mo. App. 254.

80. *Tucker v. Pennsylvania R. Co.*, 11 Misc. Rep. (N. Y.) 366, 65 N. Y. St. Rep. 124, 32 N. Y. Supp. 1, *revd.* 10 Misc. Rep. (N. Y.) 35, 62 N. Y. St. Rep. 771, 30 N. Y. Supp. 811, *rehearing denied* 12 Misc. Rep. (N. Y.)

nothing was said about the character of the cars to be used in the transportation of butter shipped, the railroad company is bound to provide refrigerator or other cars in which ice can be used to protect the butter when necessary, although the rate of charges named was the rate for common cars.⁸¹ A common carrier which accepts and uses cars selected by the shipper assumes all risks of their defects, where there is no fraud in their selection;⁸² and the fact that a person who delivered goods to a railroad corporation for transportation accepted a defective car for their conveyance, knowing it to be defective, does not exempt the corporation from liability as common carriers, for the destruction of the goods, through the defect in the car, while in course of transportation, without proof of a distinct agreement on his part to assume the risk arising from that cause.⁸³ A special contract providing that plaintiff "shall accept the cars provided by the company," does not exempt from liability for injuries to the goods shipped resulting from defective cars.⁸⁴ A stipulation in the bill of lading that the shipper accepts the cars as suitable and safe is no defense, in so far as it operates to relieve the carrier from liability for failure to provide proper cars due to its negligence;⁸⁵ nor does an agreement by a shipper of live stock whereby he assumed all risk of injury to the animals "in consequence of heat or suffocation or other ill effects of being crowded in the cars," relieve a railroad company from liability for injury in consequence of insufficient ventilation in the car furnished and used.⁸⁶ A carrier cannot escape liability for injuries caused by a defect in the car by carrying its freight in cars furnished or owned by another

117, 66 N. Y. St. Rep. 694, 33 N. Y. Supp. 93. See also, *Ruppel v. Alleghany Valley R. Co.*, 167 Pa. 166, 36 W. N. C. 210, 31 Atl. 478, 25 Pitts. L. J. N. S. 403; *Spann v. Erie Boatman's Transp. Co.*, 11 Misc. Rep. (N. Y.) 680, 67 N. Y. St. Rep. 354, 33 N. Y. Supp. 566.

81. *Beard v. St. Louis, etc., R. Co.*, 79 Iowa, 527, 42 Am. & Eng. R. Cas. 509, 44 N. W. 803; *Beard v. Illinois C. R. Co.*, 79 Iowa, 518, 42 Am. &

Eng. R. Cas. 445, 44 N. W. 800, 7 L. R. A. 280.

82. *Chesapeake & O. R. Co. v. Radbourne*, 52 Ill. App. 203.

83. *Pratt v. Ogdensburg, etc., R. Co.*, 102 Mass. 557.

84. *Wallingford v. Columbia, etc., R. Co.*, 20 S. C. 258, 2 S. E. 19.

85. *Galveston, etc., R. Co. v. Silegman* (Tex. Civ. App.), 23 S. W. 298.

86. *Kansas City, etc., R. Co. v. Holland*, 68 Miss. 351, 8 So. 516.

carrier.⁸⁷ The carrier is, in the first instance, the judge of the sufficiency of his carriages; and, where there was no special contract, a railroad company was held not liable in an action by a shipper of hay to recover for standards voluntarily erected by him upon flat cars, for safety of transportation.⁸⁸ A different rule to that applied to railroads has been held where the carriage is by wagons, and where a shipper of perishable goods by a freighter, who examined and selected as suitable for the work the wagons before entering into the contract, he was held to be estopped from claiming that they were not suited to the business of transporting the goods.⁸⁹ A railroad company which adopts an unsafe method in transporting cattle cannot defend by setting up its own usage.⁹⁰

§ 13. Tender of goods by shipper.

Where a duty to furnish facilities for transportation rests upon the carrier, either by law or contract, the shipper must show a tender of the goods to be transported at a proper place for receiving such freight, and when goods are placed at a proper place along a line of railroad to be carried, and the company, on demand, refuses to furnish cars, a sufficient delivery has been made to give a right of action against the company.⁹¹ But a carrier's announcement through its agent that it will not ship at the time contracted for is a waiver of the tender of the freight;⁹² and where it notified the shipper that it could not furnish cars and take the goods from a certain place from which it had agreed to transport them, it was unnecessary to make further demands, which both parties knew could not be complied with.⁹³

87. *Louisville, etc., R. Co. v. Dies*, 91 Tenn. 177, 18 S. W. 266; *Combe v. London, etc., R. Co.*, 31 L. T. N. S. 613.

88. *Sloan v. St. Louis, etc., R. Co.*, 58 Mo. 220.

89. *Carr v. Schafer*, 15 Colo. 48, 24 Pac. 873.

90. *Leonard v. Fitchburg R. Co.*, 143 Mass. 307.

91. *Louisville, etc., R. Co. v. Flanagan*, 113 Ind. 488, 32 Am. & Eng.

R. Cas. 532, 3 Am. St. Rep. 674. *Compare Doty v. Strong*, 1 Pin. (Wis.) 313, 40 Am. Dec. 773. See also *When failure or refusal to carry is legally excusable*, § 5, *ante*.

92. *Texas, etc., R. Co. v. Nicholson*, 61 Tex. 491, 21 Am. & Eng. R. Cas. 133.

93. *Bigelow v. Chicago, etc., R. Co.*, 104 Wis. 109, 80 N. W. 95. See *Texas, etc., R. Co. v. Avery*, 19 Tex. Civ. App. 235.

And where it appears that more of a tender than that made for transportation would be a mere waste of time and money, a useless expenditure of either is not required.⁹⁴ A common carrier does not become liable for refusal to transport goods for a former shipper, at a time when he has no goods for shipment, unless a tender is subsequently made;⁹⁵ but the fact that the shipper does not own or have the stock when the contract is made does not affect the liability of the carrier for failure to provide cars, on the ground that its promise to do so was without consideration.⁹⁶ To hold a carrier liable for damages from its failure to ship specified property, it must be shown that the contractual relation of shipper and carrier existed, or was sought to be established, with reference to the specific property, and proof of the company's failure to ship other property of the same kind when offered is not sufficient.⁹⁷ Where, in an action against a carrier, it appears from the petition that the refusal to carry was for a reason other than the non-payment of freight, a tender of freight money need not be averred.⁹⁸ An allegation that the goods were delivered according to agreement is to be construed as a delivery within a reasonable time, and an allegation of an offer and acceptance is an allegation of an acceptance before the offer was withdrawn.⁹⁹ Under the common law, a tender of a carload of such commodities as under the rules of a state railroad commission are to be loaded by the shipper is not a good tender, where the car on which the goods were when offered for transportation was the car of another line and was marked as in bad order, and, though offered several times, it was each time refused by the inspector because of such dangerous condition.¹

§ 14. Illegal purpose of shipper as a defense.

A railroad company with knowledge of the fact is not exempt

94. *State ex rel. Cumberland Teleph. & Teleg. Co. v. Texas, etc., R. Co.*, 52 La. Ann. 1850, 28 So. 284.

95. *Wilder v. St. Johnsbury, etc., R. Co.*, 66 Vt. 636, 30 Atl. 41.

96. *Pittsburgh, etc., R. Co. v. Racer*, 5 Ind. App. 209.

97. *Little Rock, etc., R. Co. v. Conatser*, 61 Ark. 560, 33 S. W. 1057.

98. *Central, etc., R. Co. v. Morris*, 68 Tex. 49, 28 Am. & Eng. R. Cas. 59.

99. *Southern Ry. Co. v. Wilcox*, 99 Va. 394, 3 Va. Sup. Ct. Rep. 321, 39 S. E. 144.

1. *Central of Ga. Ry. Co. v. Cook & Lockett*, 4 Ga. App. 698, 62 S. E. 464.

from liability for damages for failure to deliver freight, for the reason that the freight is to be used for an illegal purpose at the point of destination, unless that illegal purpose was the consideration of the contract.² A person seeking to recover against a carrier on the theory that the latter's breach of contract prevented him from shipping his cattle to a certain point in time for the Sunday market cannot show any sale or market price on Sunday, or recover any damages, or the difference between the market price on Sunday and any other day, unless, by a custom of the place, payment and delivery was to be made on Monday, the statute prohibiting Sunday sales.³ It is no excuse for the delay of a railroad company in forwarding stock that it received the stock on Sunday;⁴ nor will the fact that the contract was entered into on Sunday render it invalid, where it is to be performed on Monday.⁵ A carrier is not relieved from liability for loss of freight by its negligence by the fact that the freight was shipped under a contract for a special rate and rebate in violation of the Interstate Commerce Law;⁶ but when an interstate railroad is sued for the breach of a contract to carry goods at a reduced rate, evidence that the contract is illegal as a violation of the Interstate Commerce Law is admissible under the general issue.⁷ No damages were recoverable for the breach of a contract to transport gold into a state in insurrection during the civil war, such contract being unlawful.⁸

§ 15. Proximate cause of loss or injury.

Where a railway company agreed with a compress company to receive and transport all cotton brought by its owners to the compress company, the railway company is not liable to the

2. *Waters v. Richmond & D. R. Co.*, 110 N. C. 338, 14 S. E. 802, 55 Am. & Eng. R. Cas. 344.

3. *McAbsher v. Richmond & D. R. Co.*, 108 N. C. 344, 12 S. E. 892, 55 Am. & Eng. R. Cas. 345.

4. *Guinn v. Wabash, etc., R. Co.*, 20 Mo. App. 453.

5. *Baker v. Louisville, etc., R. Co.*, 10 Lea (Tenn.), 308.

6. *Insurance Co. of North America v. Delaware Mut. Safety Ins. Co.*, 91 Tenn. 537, 19 S. W. 755.

7. *Southern Ry. Co. v. Wilcox*, 99 Va. 394, 3 Va. Sup. Ct. Rep. 321, 39 S. E. 144.

8. *Gay's Gold*, 13 Wall. (U. S.) 358; *Cantu v Bennett*, 39 Tex. 303.

owners or insurers of such cotton for its destruction by fire, during its delay to furnish transportation, such delay not being the direct and proximate cause of the loss by fire.⁹ A railroad company is not liable for injuries to freight resulting from exposure to mud and rain in consequence of the company's violation of its contract with the road over which the freight was shipped, to maintain a narrow gauge track for the benefit of that road, as the exposure and not the failure to maintain the track is the proximate cause of the injury.¹⁰ Loss of goods by fire while waiting for a car at a mere switch is not the proximate result of a breach of contract to furnish the car at a certain time.¹¹ An action against a railroad company founded on an exclusion from freight facilities can not be maintained on evidence showing that plaintiff was crowded out by those with whom the evidence does not connect the company.¹²

§ 16. Discrimination in charges or facilities.

By the common law a common carrier is obliged to carry for all, without unreasonable discrimination, either in charges or the facilities of actual transportation, and equity has for a long time granted injunctions against extortionate charges and unjust discriminations in the business of common carriers.¹³ A shipper has, by the common law, a right of action for unjust discrimination

9. *St. Louis, etc., R. Co. v. Commercial U. Ins. Co.*, 139 U. S. 223, 49 Am. & Eng. R. Cas. 137, 35 L. Ed. 154, 11 Sup. Ca. Rep. 554, revg. *Marine Ins. Co. v. St. Louis, etc., R. Co.*, 41 Fed. Rep. 643, 43 Am. & Eng. R. Cas. 79, 19 Ins. L. J. 379, 695; *Martin v. St. Louis, etc., R. Co.*, 55 Ark. 510, 19 S. W. 314, 56 Am. & Eng. R. Cas. 112.

10. *St. Louis, etc., R. Co. v. Neel*, 56 Ark. 279, 19 S. W. 963, 12 Ry. & Corp. L. J. 110, 55 Am. & Eng. R. Cas. 428.

11. *Kansas City, etc., R. Co. v. Lilly (Miss.)*, 8 So. 644, 45 Am. & Eng. R. Cas. 379.

12. *Spurlock v. Missouri Pac. R. Co.*, 93 Mo. 530, 32 Am. & Eng. R. Cas. 538.

13. *Tift v. Southern Ry. Co.*, 123 Fed. 789; *Wheeler v. San Francisco, etc., R. Co.*, 31 Cal. 46, 89 Am. Dec. 147, when a railroad company makes contracts beyond the limits of its own road, and holds itself out ready to do so with all, it becomes a common carrier beyond its own limits, and is bound to receive passengers when the proper fare is paid. See *Central Iron Works v. Pennsylvania R. Co.*, 2 Dauph. Co. Rep. 308, overruling a demurrer, interposed on the ground that equity had no jurisdiction.

in freight charges.¹⁴ It is the duty of a common carrier not to make or give any undue or unreasonable preference or advantage to or in favor of any person, and not to subject any person to undue or unreasonable prejudice or disadvantage in respect to terms, facilities, or accommodations; and the carrier will be liable for any damage arising from violation of this duty.¹⁵ Railroad companies enjoy their franchises, which embrace much of the sovereign power of the State, in consideration of their promoting commercial intercourse, and serving the public as common carriers. They are under obligation to receive and transport, impartially, all merchandise and passengers offered to them on the terms prescribed by the grant through which they hold their franchises.¹⁶ They must receive and transport property in the order in which it is offered, and they cannot exercise par-

tion of the matter complained of in the bill, and that the plaintiff's remedy, if any, was at law.

14. *Murray v. Chicago, etc., R. Co.*, 92 Fed. 868, 35 C. C. A. 62, 13 Am. & Eng. R. Cas. N. S. 278, affg. 62 Fed. 24; *State v. Cincinnati, etc., R. Co.*, 47 Ohio St. 130, 23 N. E. 928, 7 L. R. A. 319; *Louisville, etc., R. Co. v. Wilson*, 132 Ind. 517, 32 N. E. 311, 18 L. R. A. 105; *Fitzgerald v. Grand Trunk R. Co.*, 63 Vt. 169, 13 L. R. A. 70, 3 Inters. Com. Rep. 633; *Cook v. Chicago, etc., R. Co.*, 81 Iowa 551, 46 N. W. 1080, 25 Am. St. Rep. 512, 9 L. R. A. 764, 3 Inters. Com. Rep. 383; *Cowden v. Pacific Coast S. S. Co.*, 94 Cal. 470, 29 Pac. 873, 28 Am. St. Rep. 142, 18 L. R. A. 221, but not for a mere discrimination in favor of another shipper.

15. *McDuffee v. Portland, etc., R. Co.*, 52 N. H. 430, 13 Am. Rep. 72, 2 Am. Ry. Rep. 261; *Keeney v. Grand Trunk R. Co.*, 47 N. Y. 525, where it was shown that an illegal preference had been given to other freight, by means of which cattle were detained and injured, this was held to be a

breach of the contract of transportation.

16. *Rogers Locomotive, etc., Works v. Erie R. Co.*, 20 N. J. Eq. 379, an agreement between the directors of a railroad company and an express company, which transfers the whole business of carriage of merchandise over the route to the latter, and under which the railroad company refuse to carry for the general public while the express company decline to carry subject to the liabilities of common carriers, and are at liberty to charge excessive freight, is a violation of the railroad company's obligations to the State, and may be relieved against, upon a proper bill in equity; *New England Exp. Co. v. Maine Cent. R. Co.*, 57 Me. 188, 2 Am. Rep. 31; *Sandford v. Catawissa, etc., R. Co.*, 24 Pa. St. 378, 64 Am. Dec. 667, a railroad company required by its charter to transport in the order of their reception all goods, etc., offered, "so that equal and impartial justice shall be done to all owners of property who shall pay or tender" the

tiality in accepting the property tendered by some and rejecting that offered by others. If this rule is violated, the company is liable for all damages resulting therefrom.¹⁷ Statutes providing against any discrimination in favor of or against any shipper, either as to charges or facilities, are in force in England, and in the United States, through federal and state legislation. The provisions of the Interstate Commerce Act are considered elsewhere.¹⁸ Under the English act, providing that no company shall make or give any undue or unreasonable preference or advantage to or in favor of any particular person or company, or any particular description of traffic in any respect whatever, it has been held to be unlawful discrimination to require a consignor to sign conditions affixed to a bill of lading which others of the same class are not required to sign;¹⁹ to receive goods of certain consignors after the closing of its offices and refusing those of others offering at the same time, no unusual fact appearing as the reason for the discrimination;²⁰ to admit into the station the vans of certain shippers at a later hour than those of others are allowed to enter.²¹ Under state statutes, which follow in their main features the English statutes, it has been held that the power of the legislature is by implication of the constitution restrained to a pro-

proper freight, has no right to grant to one individual an exclusive right of carrying "express matter" in its passenger trains; *Messenger v. Pennsylvania R. Co.*, 37 N. J. L. 531, 18 Am. Rep. 754, in the grant of a franchise of building and using a public railway, there is an implied condition that it is held as a *quasi* public trust for the benefit of the public, and the company possessed of the grant must exercise a perfect impartiality to all who seek the benefit of the trust.

17. *Houston, etc., R. Co. v. Smith*, 63 Tex. 322, 22 Am. & Eng. R. Cas. 421.

18. See *Interstate Transportation*, chaps. 31, 32 and 33.

19. *Baxendale v. Bristol, etc., R. Co.*, 11 C. B. N. S. 787, 103 E. C. L. 787. See *Davis v. Taft Vale R. Co.* (H. L.), 64 L. J. Q. B. N. S. 488, App. 542, 11 R. 189; *South Eastern R. Co. v. Railway Com'rs*, 41 L. T. N. S. 760, 28 W. R. 464, as to questions arising under the statute.

20. *Garton v. Bristol, etc., R. Co.*, 1 B. & S. 112, 101 E. C. L. 112, 30 L. J. Q. B. 273, 6 C. B. N. S. 639, 95 E. C. L. 639, 28 L. J. C. P. 306.

21. *Palmer v. London, etc., R. Co.*, L. R. 1 C. P. 588, 35 L. J. C. P. 289; *Palmer v. London, etc., R. Co.*, L. R. 6 C. P. 194, 40 L. J. C. P. 133; *Mariott v. London, etc., R. Co.*, 1 C. B. N. S. 499, 87 E. C. L. 499. See also cases cited in notes 63 and 64.

hibition of those discriminations which are unjust;²² that overcharges made in violation of a statute, prohibiting increase of freight rates over the rate charged at the time freight is tendered to a railroad, may be recovered;²³ that a railroad company which charges more for a short than a long haul, in violation of a constitutional provision, is liable to the shipper for the excess charged, as he whose money is taken from him illegally is to that extent damaged.²⁴ Reference must be had to the statutes

22. *Chicago, etc., R. Co. v. People*, 67 Ill. 11, 16 Am. Rep. 599. The establishment permanently of less rates of freight at points of competition with other roads than is fixed at other places for the same distance cannot be justified by showing that the rates charged at such other places are reasonably low, and that the rates charged at competing points are unreasonably low. Even if the higher rates are reasonably low, when regarded with reference to the profit on the capital invested in the road, they are not reasonable in the true sense of the term, if no satisfactory reason can be given for charging less rates for the same or greater services to persons at other stations. Such corporations should not use their power to benefit particular individuals or build up particular localities by arbitrary discriminations in their favor that may cause injury to other persons or places engaged in rival pursuits, or occupying rival positions. *Id.*

23. *Chicago, etc., R. Co. v. Wolcott*, 141 Ind. 267, 39 N. E. 451, 61 Am. & Eng. R. Cas. 135, 50 Am. St. Rep. 320.

24. *Louisville, etc., R. Co. v. Walker*, 110 Ky. 961, 23 Ky. Law Rep. 453, 63 S. W. 20. Under a provision that all railroad companies

shall "haul freight of the same class for all persons, associations, or corporations from and to the same points and upon the same conditions, in the same manner and for the same charges, and for the same method of payment," a railroad company may charge less for hauling coal used for manufacturing purposes than it charges for hauling coal for domestic purposes, as the fact that the company receives the manufactured product for return shipment in the one case and not in the other constitutes a difference in conditions which authorizes a difference in charges. *Louisville, etc., R. Co. v. Commonwealth (Ky.)*, 57 S. W. 508.

Under a provision that it shall be unlawful for any person or corporation owning or operating a railroad, or any common carrier, to charge or receive a greater compensation for transportation under substantially similar circumstances and conditions for a shorter than a longer distance over the same line in the same direction, the shorter being included within the longer distance, except under permission of the railroad commission duly granted on application, the fact that competition exists at the point to which the short haul is made does not authorize the carrier to charge more for the short haul than for the

of the different states to determine the effect of such decisions.²⁵ Actions to recover damages for discriminations in rates must be governed, as to limitations, by the statutes of the state wherein they are brought.²⁶ An action cannot be maintained against a carrier to enforce a payment of rebates on goods shipped, under a contract which is void as a discrimination in rates.²⁷

§ 17. The rule does not require the same rates and facilities for all.

Independently of the statutes it is unlawful to discriminate in favor of or against any shipper.²⁸ A majority of the recent cases hold that at common law a carrier cannot justly discriminate in rates between persons in the same circumstances.²⁹ But

long haul without permission of the commission. *Hutcheson v. Louisville, etc.*, R. Co. 108 Ky. 615, 22 Ky. Law & Rep. 361, 57 S. W. 251.

As the presumption is absolute that a shipper is damaged when he is required to pay a greater charge than the law allows, a railroad company which charges more for a short haul than for a long haul, in violation of Const. § 218, is liable for the excess charged, though it might have complied with the law without decreasing the charge for the short haul. *Hutcheson v. Louisville & N. R. Co.*, 22 Ky. Law Rep. 1871, 63 S. W. 33, rehearing 108 Ky. 615, 22 Ky. Law Rep. 361, 57 S. W. 251, denied.

25. After defendant railroad company had given plaintiff freight rates over its road between G. and another point, plaintiff contracted for a number of cars, making a shipment therein, and purchased the cargoes of a mill in G., situated on another railroad line, and defendant was compelled to pay switching charges for each car in order to get the cars transferred to its own line. It was held that defendant was not liable to plaintiff, under a statute permitting a person damaged by an over-

charge or discrimination to recover twice the amount of the injury. *Gilliland v. Illinois Cent. R. Co.* (Miss.) 32 So. 916.

26. *Ratican v. Terminal R. Ass'n of St. Louis*, 114 Fed. 666.

27. *Baltimore, etc., R. Co. v. Diamond Coal Co.*, 61 Ohio St. 242, 55 N. E. 616.

28. *Kansas, etc., R. Co. v. Bayles*, 19 Colo. 348, 61 Am. & Eng. R. Cas. 128; *Bayles v. Kansas, etc., R. Co.*, 13 Colo. 181, 40 Am. & Eng. R. Cas. 42.

29. *Root v. Long Island R. Co.*, 114 N. Y. 300, 4 L. R. A. 331, 2 Inters. Com. Rep. 576; *Cleveland, etc., R. Co. v. Closser*, 126 Ind. 348, 26 N. E. 159, 3 Inters. Com. Rep. 387, 9 L. R. A. 757; *Cook v. Chicago, etc., R. Co.*, 8 Iowa, 551, 46 N. W. 1080, 25 Am. St. Rep. 512, 9 L. R. A. 764, 3 Inters. Com. Rep. 383; *Fitzgerald v. Grand Trunk R. Co.*, 63 Vt. 169, 13 L. R. A. 70; *Messenger v. Pennsylvania R. Co.*, 37 N. J. L. 531; 18 Am. Rep. 754, affg. 36 N. J. L. 407, 13 Am. Rep. 543; *State ex rel. Atwater v. Delaware, etc., R. Co.*, 48 N. J. L. 55; *Hayes v. Pennsylvania R. Co.*, 12 Fed. 309.

the rule does not require that every shipper shall be charged exactly the same rates or allowed the same facilities; it requires that the carrier shall not unreasonably or unjustly discriminate in favor of or against any shipper where the circumstances and conditions are the same. What is reasonable and just in a common carrier in a given case is a complex question into which enters many elements for consideration. The questions of time, place, distance, facilities, quantity and character of the goods, and many other matters must be considered; regard must be had not only to the convenience of the public but also to that of the carrier; and the character of their shipments may justify a difference in rates or facilities. The carrier can afford to carry 10,000 tons of coal or other property, for instance, to a given place for less compensation per ton than he could carry fifty, and where the business of a shipper is of great magnitude a rebate from the standard rate might be just and reasonable while it could not fairly be granted to another who desired to have a trifling amount of goods carried to the same point. So long as the regular standard rates maintained by the carrier and offered to all are reasonable one shipper cannot complain because his neighbor, by reason of special circumstances and conditions, can make it an object for the carrier to give him reduced rates.³⁰ When the conditions and circumstances are identical the charges to all shippers for the same service must be equal; but if the general rates are reasonable a deviation therefrom by the carrier in favor of particular customers, for special reasons, not applicable to the whole public, does not furnish parties not similarly situated any just ground for complaint.³¹ A recovery by a ship-

30. *Lough v. Outerbridge*, 143 N. Y. 271, 42 Am. St. Rep. 712; *Butchers', etc., Stock Yards Co. v. Louisville, etc., R. Co.*, 67 Fed. 35, 31 U. S. App. 252; *West v. London, etc., R. Co.*, L. R. 5 C. P. 622; *Lees v. Lancashire, etc., R. Co.*, 18 Sol. Jour. 628; *Cooper v. London, etc., R. Co.*, 4 C. B. N. S. 738, 99 E. C. L. 738; *Nicholson v. Great Western R. Co.*, 5 C. B. N. S. 366, 94 E. C. L. 366, 4 Jur. N. S. 1187.

31. *Fitchburg R. Co., v. Gage*, 12 Gray (Mass.), 393; *DeMenacho v. Ward*, 23 Blatchf. (U. S.) 505; *Johnson v. Pensacola, etc., R. Co.*, 16 Fla. 623, 26 Am. Rep. 731; *Concord, etc., R. Co. v. Forsaith*, 50 N. H. 122, 47 Am. Rep. 181; *Avinger v. South Carolina R. Co.*, 29 S. C. 265, 13 Am. St. Rep. 716, 35 Am. & Eng. R. Cas. 519; *State v. Cincinnati, etc., R. Co.*, 47 Ohio St. 130, 42 Am. & Eng. R. Cas. 330; *Ragan v. Aiken*, 9 Lea.

per from a carrier because of partiality and favoritism to other shippers cannot be had, in the absence of statute, provided the complaining shipper has not been charged more than a reasonable rate.³² So there can be no unjust discrimination of which commissions and courts can take cognizance unless it is unlawful.³³ In determining the reasonableness of rates to be charged for railroad transportation, the original cost of construction, the amount expended in permanent improvements, the amount and market value of bonds and stock, the present, as compared with the original, cost of construction, the probable earning capacity of the property under the rates prescribed, and the sum required to meet operating expenses, and possibly other matters, must be considered.³⁴ It is the duty of the carrier to send forward goods in the order of time in which they were received for transportation, whenever there is necessary delay in forwarding goods received for shipment as, for example, by reason of a heavy blockade of freight, and the carrier is liable for receiving the goods of one shipper after rejecting those of a prior applicant on the ground of such a blockade.³⁵ This rule against discrimination in the order of shipment of goods tendered is not applied in the case of perishable freights, which have a preference owing to the dangers to which they are subject by delay;³⁶ and it has been held not to apply to exceptional cases where it was necessary to for-

(Tenn.), 609, 42 Am. Rep. 684, 9 Am. & Eng. R. Cas. 201; *Sargent v. B. & L. R. Corp.*, 115 Mass. 422; *Mogul S. S. Co. v. McGregor, Gow & Co.*, L. R. 21 Q. B. 544, *affd.* L. R. 23 Q. B. 598; *Evershed v. London, etc., R. Co.*, L. R. 3 Q. B. 135; *Canada Southern R. Co. v. International Bridge Co.*, L. R. 8 App. 723; *Ransome v. Eastern Counties R. Co.*, 1 C. B. N. S. 437, 87 E. C. L. 437; *Baxendale v. Eastern Counties R. Co.*, 4 C. B. N. S. 78, 93 E. C. L. 78; *Branley v. Southeastern R. Co.*, 12 C. B. N. S. 74, 104 E. C. L. 74.

32. *Parsons v. Chicago, etc., R. Co.*, 167 U. S. 447, 17 Sup. Ct. Rep. 887;

Johnson v. Dominion Express Co., 28 Ont. Rep. 203.

33. *Brewer v. Central of Ga. R. Co.*, 84 Fed. 258.

34. *Smyth v. Ames*, 169 U. S. 465, Adv. S. U. S. 438, 42 L. Ed. 819, 30 Chic. Leg. News 243, 18 Sup. Ct. Rep. 418, modified on rehearing in 171 U. S. 361, Adv. S. U. S. 967, 18 Sup. Ct. Rep. 488.

35. *Acheson v. New York Cent., etc., R. Co.*, 61 N. Y. 653, 17 N. Y. St. Rep. 278; *Houston, etc., R. Co. v. Smith*, 63 Tex. 322, 22 Am. & Eng. R. Cas. 421; *Page v. Great Northern R. Co.*, 2 Ir. Rep. (C. L.) 288.

36. See Liability for delay, perishable freights, § 7, chap. 8.

ward relief for sufferers from fire or flood.³⁷ Carriers like express companies are not bound to go beyond the limits in a city, established by themselves and other companies, to receive goods for transportation, or to deliver goods beyond such limits, to one having knowledge of them.³⁸ It has been held that a common carrier may require prepayment from one shipper though it may not require it from others, since demanding prepayment is but the exercise of a right to demand of every one that the charges upon all freight shall be paid in advance.³⁹

§ 18. The compensation of the carrier.

The reward which the carrier receives for the carriage or transportation of property is one of the grounds on which the carrier's responsibility is based. It is not necessary that the compensation should be agreed upon at a fixed sum; the law implies an undertaking or promise on the part of the shipper to pay a reasonable reward for the carriage of goods delivered by him to the carrier for that purpose.⁴⁰ He may demand prepayment of charges,⁴¹ or, after he has performed the service, recover the amount agreed upon, or, in the absence of an agreement, a reasonable compensation from the shipper or consignor. The person liable for the freight charges, when action is brought, may offset or counterclaim any damages arising from breach of the carrier's contract, or for loss or damage to the goods,⁴² or damage caused by unreasonable delay.⁴³ In England a different rule prevails and, if the carrier

37. *Michigan Cent. R. Co. v. Burrows*, 33 Mich. 6.

38. *Bullard v. American Express Co.*, 107 Mich. 695, 65 N. W. 551, 61 Am. St. Rep. 358, 33 L. R. A. 66, 2 Det. L. N. 735.

39. *Randall v. Richmond, etc., R. Co.*, 108 N. C. 612, 49 Am. & Eng. R. Cas. 75; *Allen v. Cape Fear, etc., R. Co.*, 100 N. C. 397, 35 Am. & Eng. R. Cas. 532.

40. *Merritt v. Earle*, 29 N. Y. 115; *Allen v. Sewall*, 2 Wend. (N. Y.) 327.

41. See § 6, *ante*.

42. *Gleadell v. Thomson*, 56 N. Y. 194; *Hinsdall v. Weed*, 5 Denio (N. Y.), 172; *Hill v. Leadbetter*, 42 Me. 572; *Kaskaskia Bridge Co. v. Shannon*, 1 Gilman (Ill.), 15; *Leech v. Baldwin*, 5 Watts (Pa.), 446; *Humphreys v. Read*, 6 Whart. (Pa.) 435; *Bartram v. McKee*, 1 Watts (Pa.), 39; *Edwards v. Todd*, 1 Scam. (Ill.) 462; *Dyer v. Railway Co.*, 42 Vt. 441; *Ewart v. Kerr*, 1 Rice (S. C.) 203; *Snow v. Carruth*, 1 S. P. R. (U. S.) 324.

43. *Page v. Munro*, 1 Holmes (U.

has carried and is ready to deliver the goods, he is entitled to recover his freight charges in full, and the owner or consignee must resort to a separate action to recover any loss sustained.⁴⁴ As a general rule the carrier can only recover compensation for the carrying of the goods actually delivered to the consignee. If the goods have been lost through leakage or other causes without the negligence of the carrier, or if perishable goods have decayed and been cast away, or if goods have been necessarily jettisoned in a storm, or lost from causes against which the carrier has protected himself by contract, he will still be entitled to recover freight charges upon the goods which he safely delivers, but not for the freight charges on those which were lost and could not be delivered.⁴⁵ If part of the property be lost, and the consignee accepts the residue, he is liable for freight *pro rata*, but may recoup the value of that not delivered.⁴⁶ But if the carrier is ready to deliver the goods to the consignee and offers to do so, but the latter is not prepared to receive them, and the goods are subsequently lost without fault of the carrier, full freight is nevertheless recoverable.⁴⁷ Where the carrier is prevented from delivering the freight because of inevitable accident, he can recover freight charges for only that portion which is delivered. As to the freight destroyed, the owner must lose the goods and the carrier the freight.⁴⁸ The obligation of the carrier continues after arrival at the point or place of delivery until a reasonable time after such arrival in order to allow the consignee to take possession of the goods, and freight charges are not earned or recoverable where the goods are lost without the fault of the carrier, after the arrival at the place of delivery and notice thereof, but before a reasonable time for removing the goods has elapsed.⁴⁹ And when by contract the shipper assumed all risks and loss of its property by fire, when in the

S.), 232; *The Success*, 7 Blatchf. (U. S.) 551.

44. *Dakin v. Oxley*, 15 Com. B. N. S. 646.

45. *Steelman v. Taylor*, 3 Ware (U. S.), 52; *The Brig Collenberg*, 1 Black (U. S.), 170; *The Cuba*, 3 Ware (U. S.), 260.

46. *Hinsdell v. Weed*, 5 Denio (N. Y.), 172.

47. *Clendaniel v. Tuckerman*, 17 Barb. (N. Y.), 184.

48. *Price v. Hartshorn*, 44 N. Y. 94, 4 Am. Rep. 645, affg. 45 Barb. (N. Y.) 655, 668; *Harris v. Rand*, 4 N. H. 259.

49. *Russell Mfg. Co. v. New Haven Steamboat Co.*, 52 N. Y. 657, 50 N. Y. 121; *McKee v. Hecksher*, 10 Daly (N. Y.), 393.

charge or custody of the carrier, the carrier was not entitled to recover freight, nor back charges paid by it to a co-contractor, when the property was destroyed by an accidental fire while in the custody of the carrier.⁵⁰

§ 19. Excessive charges and actions therefor.

The common law puts no restrictions upon the carrier in respect to his demand for compensation except that his charges shall be reasonable. There is no common law requiring the carrier to charge equal rates. The rates must merely not be excessive. The commonness of the duty to carry for all does not involve a commonness or equality of compensation. The tariff of rates, or what is charged to one party, is but a matter of evidence from which it may be determined whether a charge to another is reasonable.⁵¹ Moneys illegally exacted as a condition of the transportation or delivery of goods, beyond the amount to which the party demanding is justly entitled, when paid under protest, in order to secure the transportation or to obtain possession of the goods, are not paid voluntarily but under compulsion, and may be recovered.⁵²

50. *New York Cent., etc., R. Co. v. Standard Oil Co.*, 87 N. Y. 486, affg. 20 Hun (N. Y.), 39.

51. *Louisville, etc., R. Co. v. Wilson*, 119 Ind. 352, 4 L. R. A. 244, 21 N. E. 341, 6 R. & Corp., L. J. 11; *Johnson v. Pensacola R. Co.*, 16 Fla. 623, 26 Am. Rep. 731; *Harris v. Packard*, 3 Taunt. 264, "a carrier is bound by law to carry everything which is brought to him for a reasonable sum to be paid to him for the same carriage and not to extort what he will; we cannot say that the carrier is bound to carry anything beyond articles of such class as he is under a legal obligation to carry, but it is unquestionably true that his charge be 'reasonable.'" See also *Pickford v. Grand Junction R. Co.*, 8 M. & W. 378.

"It may be in the nature of a quantum meruit," says Mr. Justice Story, speaking of the hire or recompense of common carriers, in *Citi-*

zens' Bank v. Nantucket S. Co., 2 Story (U. S.), 35. The same view is announced in *Van Bokkelin v. Ingersoll*, 5 Wend. (N. Y.) 340, and *Bridge v. Johnson*, 5 Wend. (N. Y.) 350. See also *Fitchburg R. Co. v. Gage* 12 Gray (Mass.), 393.

52. *Harmony v. Bingham*, 12 N. Y. 99, 1 Duer (N. Y.), 209; *Parker v. The Railway Co.*, 6 Exch. 702 6 El. & B. 77; *Ashmole v. Wainwright*, 2 Q. B. 837; *Snowdon v. Davis*, 1 Taunt. 359; *Louisville, etc., R. Co. v. Walker*, 23 Ky. Law Rep. 453, 63 So. 20; *Virginia Coal & Iron Co. v. Louisville, etc., R. Co.*, 98 Va. 776, 37 S. E. 310, 2 Va. Sup. Ct. Rep. 631.

Where, by a traffic arrangement between a standard guage railroad and a connecting narrow guage line, shipments of goods over the narrow guage line and then over the standard guage were charged for by the standard guage at the rate of three narrow guage cars to two standard

Where a consignee paid an excess of freight charged over the rate specified in the bill of lading under protest, such additional payment was not voluntary, so as to preclude him from maintaining an action to recover the same.⁵³ Where a shipper in order to obtain cars to ship his grain, is compelled to pay an additional charge, or suffer the alternative of paying damages arising from a failure to deliver the grain as agreed, such payment is not voluntary, and will not preclude an action to recover back the money so paid for cars.⁵⁴ In an action by the shipper against the receiving carrier to recover the difference between the amount alleged to have been stated by the agent as the rate over the lines of the connecting carrier, and that actually charged, a general denial by defendant raised an issue as to whether the agent's statements bound the receiving carrier, and the burden of proof to show that the station agent had authority to bind his company was on plaintiff.⁵⁵ A letter from one of the railroad commissioners is not proper evidence to show the commission rates on goods shipped

guage ones, and a shipper of cattle over the lines (the carriage commencing over the narrow guage road) knew of such agreement, he was not charged in excess of the tariff rates, though, owing to the manner in which the cattle were loaded in the narrow guage cars the broad guage railroad found that it could and did place the cattle in a less number of standard guage cars than he had receipted for. *Carlisle v. Missouri Pac. R. Co.*, 97 Mo. App. 571, 71 S. W. 475.

53. *Southern Ry. Co. v. Anniston Foundry & Mach. Co.*, 135 Ala. 315, 33 So. 274, and the fact that the rate specified in the bill of lading was fixed by the agent by mistake did not authorize the carrier to exact an increased rate.

54. *Galesburg, etc., R. Co. v. West*, 108 Ill. App. 504, holding also that after a common carrier has established a schedule rate for hauling

grain between two stations, it cannot charge one shipper an additional sum for switching cars between his elevator and the carrier's tracks.

Where in an action against a railroad company to recover an alleged overcharge of freight, it appeared that defendant had contracted to transport the goods for a certain sum, but that, when the goods arrived at their point of destination, the connecting carrier refused to deliver them, except on the payment of additional freight, but there was no showing that the defendant received any part of the sum so collected, it was held, that a judgment against the defendant for the over charge exacted by the connecting carrier was unauthorized. *Chicago, etc., R. Co. v. Henderson* (Tex. Civ. App.), 73 S. W. 36.

55. *McLagan v. Chicago, etc., R. Co.* (Iowa), 89 N. W. 233.

by a common carrier in an action against the carrier for overcharges⁵⁶

§ 20. Injunctions.

A bill by a carrier for an injunction to restrain hackmen from entering its station grounds to solicit passengers and baggage, after notice not to do so, is not demurrable for failure to allege that plaintiff has been injured by such trespassers, since damage is the necessary result thereof.⁵⁷ A complaint for an injunction by a railroad company against one who has violated its rules in coming on its station grounds to solicit business is sufficient where it alleges that the company has been damaged thereby, and that defendant's property is insufficient to respond in damages, without setting out the evidence to show the elements of such damages, if facts are set forth which show that the damage might be great, on account of the obstruction of the company's business.⁵⁸

56. *Wells, Fargo Express Co. v. Williams* (Tex. Civ. App.), 71 S. W. 314, holding also that the statute does not prohibit a carrier from charging less than the maximum rates fixed by the Commission, where no discrimination appears; and, where the carrier after agreeing to carry at a reduced rate, collects the full rate, the difference may be recovered by the shipper.

57. *Boston & M. R. R. v. Sullivan*,

177 Mass. 230, 58 N. E. 689, 83 Am. St. Rep. 275.

58. *New York, etc., R. Co. v. Seoville*, 71 Conn. 136, 41 Atl. 146, 42 L. R. A. 157, 71 Am. St. Rep. 159, a complaint for an injunction is not demurrable if, on any state of proof which its allegations justify, the court could grant the injunction, in the reasonable exercise of judicial discretion. See also, *Joyce on Injunctions*, Vol. 1, p. 65, § 31.

CHAPTER IV.

COMMENCEMENT OF CARRIER'S LIABILITY.—DELIVERY TO CARRIER.

- SECTION**
1. Commencement of carrier's liability.
 2. Effect of delivery and acceptance other than initiating liability of carrier.
 3. Acts constituting delivery to and acceptance by carrier.
 4. Constructive delivery—Custom and usage.
 5. Questions of law and fact—Question for jury.
 6. Acceptance may be implied from proper tender.
 7. Deposit of goods elsewhere than at regular office or depot.
 8. Delivery to agent of carrier—Authority of agent to receive goods.
 9. Bill of lading not essential to constitute delivery.
 10. Bill of lading as an evidence of delivery.
 11. Duty to issue bill of lading.
 12. Loading goods on cars.
 13. Proof of delivery to the carrier.

§ 1. Commencement of carrier's liability.

The liability of a common carrier for goods received by it begins as soon as they are delivered to it, its agents or servants, at the place appointed or provided for their reception, or at the place where the carrier is accustomed or agrees to receive them when they are in fit and proper condition and ready for immediate transportation.¹ A carrier's liability begins when it receives freight

1. *London & L. Fire Ins. Co. v. Rome, etc.*, R. Co., 144 N. Y. 200, 39 N. E. 79, 43 Am. St. Rep. 752, 61 Am. & Eng. R. Cas. 225; *Central of Ga. R. Co. v. Sigma Lumber Co.*, 170 Ala. 627, 54 So. 205; *Southern Express Co. v. Newby*, 36 Ga. 635, 91 Am. Dec. 783; *Central of Ga. R. Co. v. Butler Marble & Granite Co.*, 8 Ga. App. 1, 68 S. E. 775; *A. P. Loveman & Co. v. Alabama, etc., R. Co.*, — Ala. —, 57 So. 817; *Fuller v. Illinois Central R. Co.*, 164 Ill App.

284, if the shipper captiously withholds shipping directions, the company into whose possession the goods have come is only liable as a warehouseman during the period of the withholding of such directions.

Stock shipments.—Where cattle have been placed in the carrier's pen for immediate shipment over its railroad, and part of them have actually been placed on the cars, the cattle are in the custody of the carrier, as a carrier, and not as a warehouse-

for immediate shipment.³ The liability of a common carrier at-

man. *Gulf, etc., R. Co. v. Trawick*, 80 Tex. 270, 15 S. W. 568.

A statutory provision that the transportation of goods by a common carrier shall be considered as commenced from the time the bill of lading is signed, does not preclude the liability from commencing before, viz. from the time of the delivery of the goods, so as to make the carrier liable for loss when no bill is issued. *East Line, etc., R. Co. v. Hall*, 64 Tex. 615.

When goods marked with the name and address of the consignee are delivered to and received by a common carrier, it is equivalent to a direction to transport and deliver the same as marked, and the carrier has the right, and it is his duty, at once to forward them to the consignee at their destination in the usual course of business, and the carrier's liability as insurer at once attaches, and until this is done it is not relieved of its responsibility as a carrier. *Shelton v. Merchants' Dispatch Transp. Co.*, 36 N. Y. Super Ct. 527, rev'd 59 N. Y. 258 on the ground that the circumstances of the case established a special contract; *Witbeck v. Holland*, 45 N. Y. 13; *White v. Goodrich Transp. Co.*, 46 Wis. 493, 21 Am. Ry. Rep. 398; *O'Neill v. New York Cent., etc., R. Co.*, 3 Thomp. & C. (N. Y.) 399; *Id.* 60 N. Y. 138; *Gregory v. Wabash R. Co.*, 46 Mo. App. 574.

If goods are detained at the request of the consignor, after delivery to the carrier for transportation, the liability of the carrier during such detention, is that of a warehouseman only. *St. Louis, etc., R. Co. v. Montgomery*, 39 Ill. 336.

A nonsuit is properly denied where it appears that a shipper delivers a box to the driver of a local transfer company, prepaying the charges thereon and taking a receipt therefor from the express company, which receipt he subsequently gave to the shipper, at which time the box while in the possession of the express company had been burned. *Hill v. Adams Express Co.*, 77 N. J. Law, 19, 71 Atl. 683.

Drayage company.—The liability of a drayage company as a common carrier began when it accepted and received goods situated in a car on a house track commonly used for unloading goods, when it took possession of the car and began actual removal of the goods. *Arkadelphia Milling Co. v. Smoker Merchandise Co.*, 100 Ark. 37, 139 S. W. 680.

To make a railroad company liable as a common carrier or warehouseman for baggage lost, it must have been delivered to and accepted by the carrier, either actually or constructively. *Williams v. Southern R. Co.*, 155 N. C. 260, 71 S. E. 346.

The liability of a ferryman as a common carrier commences when the custody and control of the goods have been turned over to him; there is no delivery to him until this is done. *Wyckoff v. Queens Co. Ferry Co.*, 52 N. Y. 32, 11 Am. Rep. 650; *White v. Winnisimmet Co.*, 61 Mass. (7 Cush.) 155. *Compare* *Blakeley v. Le Duc*, 19 Minn. 187; *Miles v. James*, 1 McCord L. (S. C.) 157; *Cohen v. Hume*, 1 McCord L. (S. C.) 439; *Cook v. Gourdin*, 2 Nott & M. (S. C.) 19.

After the carrier by water receipts

taches by virtue of either full delivery of the merchandise to be transported or acceptance of such merchandise by the carrier.³ When a shipper surrenders the entire custody of his goods to a common carrier for transportation, the liability of the carrier at once attaches. The liability does not attach until the goods to be shipped are unconditionally delivered by the shipper and accepted by the carrier.⁴ If a common carrier receives goods into its own warehouse for the accommodation of itself and its customers, so that the deposit there is a mere accessory to the carriage and for the purpose of facilitating it, in other words, if they are deposited for the purpose of being carried without further orders, its liability as a carrier begins with the receipt of the goods.⁵ But, on the contrary, if the goods when so deposited are not ready for immediate transportation, and the carrier cannot make arrangements for their carriage to the place of destination until something further is done, or some further direction is given or communication made concerning them by the owner, or consignor, the deposit must be considered to be in the meantime for his convenience and accommodation, and the carrier until some change takes place will be responsible only as a warehouseman. The party bringing the goods must first do whatever is essential to enable the carrier to commence, or to make needful preparations for commencing, the service required of it, before it can be made

for merchandise, it is at his risk as much if on board the ship or vessel. *Barrett v. Salter*, 10 Rob. (La.) 434; *Greenwood v. Cooper*, 10 La. Ann. 796.

2. *Garner v. St. Louis, etc., R. Co.*, 79 Ark. 353, 96 S. W. 187, 116 Am. St. Rep. 83; *Abbott Gin Co. v. Missouri, etc., R. Co. of Texas*, 57 Tex. Civ. App. 263, 122 S. W. 284. The liability of a carrier is complete when it receives entire control of the goods for immediate transportation. *St. Louis, etc., R. Co. v. Murphy*, 60 Ark. 333, 30 S. W. 419. A carrier's liability as insurer for a loss of goods begins when a carrier has actually received the goods as a carrier for

immediate shipment. *Pittsburg, etc., R. Co. v. American Tobacco Co.*, 31 Ky. Law Rep. 1013, 104 S. W. 377. It does not depend upon the issuance of a bill of lading. *St. Louis, etc., R. Co. v. C. C. Burrow & Co.*, 89 Ark. 178, 116 S. W. 198; *Berry v. Southern R. Co.*, 122 N. C. 1002, 30 S. E. 14.

3. *Corning & Co. v. Peoria, etc., R. Co.*, 144 Ill. App. 407.

4. *Chicago, etc., R. Co. v. Powers*, 73 Neb. 816, 103 N. W. 678.

5. *Blossom v. Griffin*, 13 N. Y. 569, 67 Am. Dec. 75; *Clarke v. Needles*, 25 Pa. St. (1 Casey) 338; *Marshall v. New York Cent. R. Co.*, 45 Barb. (N. Y.) 502.

liable or subjected to responsibility in that capacity. Where goods are delivered to a common carrier to await further orders from the shipper before shipment, the carrier, while the goods are so in its custody is liable only as warehouseman. A carrier is responsible, as a carrier, only when goods are delivered and accepted by it for immediate transportation in the usual course of business.⁶ When a consignor of goods delivers them to a carrier, relinquishing all control over them, the carrier becomes immediately liable as a common carrier; but if the goods are merely placed in the carrier's depot for the consignor's convenience, and are not ready for shipment until the consignor has done something further to them, the carrier is not so liable.⁷ The carrier is liable, as a common carrier, for the loss of goods which have been placed in its depot or warehouse for shipment at its earliest convenience, and when nothing remains for the owner to do before shipment.⁸ The relation of shipper and carrier does not begin between the owner of goods and a carrier, though the former may have delivered the goods to the latter, if, after such delivery, anything required, either by law or the contract, remains to be done by the shipper.⁹ The liability of a carrier, as such, for goods received for trans-

6. *London & L. Fire Ins. Co. v. Rome, etc., R. Co., supra.*; *O'Neill v. New York Cent., etc., R. Co.*, 60 N. Y. 138, rev'g 3 *Thomp. &c. (N. Y.)* 399; *Rogers v. Wheeler*, 52 N. Y. 262; *Wade v. Wheeler*, 3 *Lans. (N. Y.)* 201, aff'd 47 N. Y. 658, the liability as common carrier commences on the acceptance of such order for transportation; *St. Louis, etc., R. Co. v. Knight*, 122 U. S. 79, 7 *Sup. Ct.* 1132, 30 *L. Ed.* 1077, 30 *Am. & Eng. R. Cas.* 88; *Michigan, etc., R. Co. v. Shurtz*, 7 *Mich.* 515; *Burrowes v. Chicago, etc., R. Co.*, 85 *Neb.* 497, 123 *N. W.* 1028, *judg. aff'd on rehearing* 126 *N. W.* 1084; *Louisville & N. R. Co. v. United States*, 39 *Ct. Cl. (U. S.)* 405; *Little Rock, etc., R. Co. v. Hunter*, 42 *Ark.* 200, 18 *Am. & Eng. R. Cas.* 527; *Murray v. In-*

ternational Steamship Co., 170 *Mass.* 166, 48 *N. E.* 1093, 64 *Am. St. Rep.* 290; *Basnight v. Atlantic, etc., R. Co.*, 111 *N. C.* 592, 16 *S. E.* 323; *Colorado B. R. Co. v. Breniman*, 22 *Colo. App.* 1, 125 *Pac.* 855.

7. *Stapleton v. Grand Trunk R. Co.*, 133 *Mich.* 187, 94 *N. W.* 739, 10 *Det. Leg. N.* 133; *Judson v. Western R. Corp.* 86 *Mass.* (4 *Allen*) 520, 81 *Am. Dec.* 718.

8. *Grand Tower Mfg. & Transp. Co. v. Ullman*, 89 *Ill.* 244.

9. *Dixon v. Central of Ga. Ry. Co.*, 110 *Ga.* 173, 35 *S. E.* 369; *Bainbridge Grocery Co. v. Atlantic Coast Line R. Co.*, 8 *Ga. App.* 677, 70 *S. E.* 154; *American Lead Pencil Co. v. Nashville, etc., R. Co.*, 124 *Tenn.* 57, 134 *S. W.* 613.

portation, does not commence until the duty to transport has completely arisen by the delivery, and acceptance of the goods for immediate transportation,¹⁰ and until that time it does not hold the goods in the capacity of a common carrier.¹¹ The entire weight of the responsibility rigorously imposed by law upon a common carrier falls upon it contemporaneously (*eo instanti*) with a complete delivery of the goods to be forwarded, if accepted, with or without a special agreement as to reward; for the obligation to carry safely on delivery carries with it a promise to keep safely before the goods are put *in itinere*.¹² To render a common carrier liable for loss of property, it must be established that the property was actually delivered to it, or to some person duly authorized to act on its behalf, for transportation. The responsibility of the carrier does not commence until the delivery is completed.¹³ The goods must have been delivered into the exclusive control of the carrier, and accepted by the latter in that capacity for transportation.¹⁴ The liability of the carrier attaches only from the time of the acceptance of the goods by it.¹⁵ It is not enough that the property is delivered upon the premises of the carrier, unless the delivery is accompanied by notice to the proper person.¹⁶ The liability of a common carrier attaches as soon as the delivery of the goods for transportation is complete, so as to place on the carrier the exclusive duty of seeing after their safety.¹⁷ Where

10. *Barron v. Eldredge*, 100 Mass. 455.

11. *Clara Turner Co. v. New York, etc., R. Co.*, 86 Conn. 71, 84 Atl. 298.

12. *London & L. Fire Ins. Co. v. Rome, etc., R. Co.*, *supra*.

13. *Grosvenor v. New York Cent. R. Co.*, 39 N. Y. 34, 5 Abb. Prac. (N. S.) 345; *Trowbridge v. Chapin*, 23 Conn. 595; *Merriam v. Hartford, etc., R. Co.*, 20 Conn. 354, 52 Am. Dec. 344.

14. *Truax v. Philadelphia, etc., R. Co.*, 3 Houst. (Del.) 233.

15. *Packard v. Getman*, 6 Cow. (N. Y.) 757.

16. *Grosvenor v. New York Cent. R. Co.*, *supra*; *Packard v. Getman*,

supra; *Trevor v. U. & S. R. Co.*, 7 Hill (N. Y.) 47; *Blanchard v. Isaacs*, 3 Barb. (N. Y.) 388. That the owner of goods has loaded them in a car for shipment, though the carrier has placed the car in a convenient position for such purpose, will not make the carrier an insurer, but before delivery is completed the owner must relinquish all control over the car, and notice that it was ready for shipment must have been given. *Kansas City, etc., R. Co. v. Cox*, 25 Okl. 774, 108 Pac. 380, 32 L. R. A. N. S. 313.

17. *London & L. Fire Ins. Co. v. Rome, etc., R. Co.*, *supra*; *Milne v. Chicago, etc., R. Co.*, 155 Mo. App. 465, 135 S. W. 85; *Ames v. Fargo*,

goods are accepted for shipment, whether intended to be immediate or remote, the placing of the goods upon its platform renders a carrier responsible for any damages thereto from fire originating within its right of way, unless released from liability by the shipper.¹⁸ Where a railroad, under agreement with a warehouse company, places a car on a side track to be loaded for immediate shipment, the railroad to pay for the loading, and the goods are loaded by the employes of the warehouse, duly marked as to destination, it is a delivery to the railroad as a common carrier, and it is liable to the owner for loss of the goods by fire.¹⁹ So where a railroad company maintains a side track adjacent to a wheat elevator, and a car is loaded for shipment, and a bill of lading providing that the carrier shall be responsible for any loss or damage is issued and sent to the elevator company's office, the car is received for shipment and the railroad company is liable as a common carrier for its destruction by fire on the side track before it was removed.²⁰ A carrier's common-law liability as an insurer of freight does not attach until the freight has been actually or constructively delivered to and accepted by it.²¹

§ 2. Effect of delivery and acceptance other than initiating liability of carrier.

As has been already shown, the liability of a common carrier attaches by virtue of either full delivery of the merchandise to be

114 App. Div. (N. Y.) 666, 99 N. Y. Supp. 994, ordinarily the liability of a common carrier begins when the goods are delivered to it for transportation and it assumes dominion over them.

18. *Griffin v. Atlantic Coast Line R. Co.*, 89 S. C. 547, 72 S. E. 463. Carrier held not liable for cotton burned in another's warehouse, the cotton never having been actually or constructively delivered to the carrier. *A. P. Loveman & Co. v. Alabama, etc., R. Co.*, Ala., —, 57 So. 817.

19. *Central of Ga. R. Co. v. Bird*, 10 Ga. App. 423, 73 S. E. 599.

20. *Cincinnati Grain Co. v. Louisville & N. R. Co.*, 146 Ky. 237, 142 S. W. 374.

21. *W. G. Dunnington & Co. v. Louisville & N. R. Co.*, 153 Ky. 388, 155 S. W. 750. A railroad company's liability as insurer did not attach as to tobacco loaded in cars on a side track, where the loading had not been completed, the carrier given notice to move the cars or any bill of lading issued, and no custom to treat such freight as delivered was shown. *Id.*

transported or by acceptance of such merchandise by the carrier.²² Delivery of goods to a carrier raises a presumption that it receives them as such, and puts on it the burden of showing that it received them only as warehouseman.²³ Common carriers may be carriers of money as well as of goods if such carriage is sanctioned by the usage of trade; but where no usage is shown, the receiving of money and the agreement of the carrier to deliver raises the presumption that such is its customary employment.²⁴ Whether a shipper complied with a custom of carriers requiring shippers desiring a car to be forwarded on a certain date to deliver the shipment before a certain hour is immaterial, if the conditions are waived and the shipment is in fact accepted by the carrier for transportation and delivery.²⁵ A common carrier must accept freight from every one offering the same, and is not guilty of conversion in accepting freight from a party in possession thereof, unless the true owner intervenes before the goods are delivered and demands them.²⁶

§ 3. Acts constituting delivery to and acceptance by carrier.

To complete the delivery of the property within the rules laid down in the authorities it is essential that the property should be placed in such a position that it may be taken care of by the agent or person having charge of the business of the carrier, and under his immediate control. It must be accepted and received by the agent.²⁷ There must be an actual delivery of the goods to the

22. *Corning & Co. v. Peoria, etc.*, R. Co., 144 Ill. App. 407.

23. *Berry v. Southern Ry. Co.*, 122 N. C. 1002, 30 S. E. 14.

24. *Choteau v. The St. Anthony*, 11 Mo. 226.

25. *Central of Ga. Ry. Co. v. Butler Marble & Granite Works*, 8 Ga. App. 1, 68 S. E. 775.

26. *Robert C. White Live Stock Commission Co. v. Chicago, etc., R. Co.*, 87 Mo. App. 330.

27. *Grosvenor v. New York Central R. Co.*, 39 N. Y. 34, 5 Abb. Pr. (N. S.) 345.

Where goods were not in fact delivered to the carrier, the mere fact that the goods were receipted for by the carrier's agent, who had no knowledge of their delivery, except a slip signed by the boatman, will not create liability for their non-delivery. *The Willis D. Sandhovel*, 92 Fed. 286.

No express contract being shown to carry to such place, an express company is not liable for a package of treasury notes, left at its office to be carried to a place to which it is not a common carrier, nor for the conversion of the notes themselves.

carrier, or a constructive delivery, with notice to it of an intention thereby to place them in its care and custody. Merely placing them in such a position that it could easily take them, but without calling its attention to them, is not sufficient.²⁸ The liability of the common carrier is fixed by accepting the property to be transported, and the acceptance is complete whenever the property comes into its possession with its assent.²⁹ The property must have been delivered into the exclusive control of the carrier, and accepted by the latter in that capacity for transportation.³⁰ There is no delivery and acceptance so as to create the relation of shipper and carrier so long as the owner retains control of the goods; there must be a change of possession from the shipper to the carrier, and the former must relinquish all custody and control of the property for the time being, leaving the exclusive possession in the carrier, so as to put upon the carrier the exclusive duty of looking after the safety of the goods.³¹ Where goods are delivered to and accepted by a carrier, no bill of lading

Pitlock v. Wells, Fargo & Co., 109 Mass. 452.

28. O'Bannon v. Southern Express Co., 51 Ala. 481; Southwestern R. Co. v. Webb, 48 Ala. 585.

29. Illinois Cent. R. Co. v. Smyser, 38 Ill. 354, 87 Am. Dec. 301; Southern R. Co. v. McVeigh, 20 Gratt. (Va.) 264.

30. Truax v. Philadelphia, etc., R. Co., 3 Houst (Del.) 233.

In order to constitute delivery to a carrier, complete control of the goods must be given to it. Gulf, etc., Ry. Co. v. Lowery, (Tex. Civ. App.) 155 S. W. 992.

31. London, etc., Fire Ins. Co. v. Rome, etc., R. Co., 144 N. Y. 200, 39 N. E. 79, 43 Am. St. Rep. 752, 61 Am. & Eng. R. Cas. 225, wherein it was held that a railroad company to which hay was delivered for immediate shipment, and accepted by it, and placed in its freight house because it had no cars in which to

place it, was liable for its loss as a common carrier, although it was the shipper's duty to load it upon the cars; Missouri Pac. R. Co. v. McFadden, 154 U. S. 155, 14 Sup. Ct. 990, 38 L. Ed. 994, holding that a carrier is not liable on a bill of lading for cotton which at the time of the signing of the bill remained in possession of a compress company, as agent for the shipper to be compressed for the shipper's account, and was destroyed by fire before delivery to the carrier had been consummated; Wilson v. Atlanta, etc., R. Co., 82 Ga. 386, 9 S. E. 1076, 40 Am. & Eng. R. Cas. 225, holding that delivery for carriage involves a complete surrender of the control and possession of the goods to the carrier; Frazier v. Kansas City, etc., R. Co., 48 Iowa 571; Lake Shore, etc., R. Co. v. Foster, 104 Ind. 293, 4 N. E. 20, 54 Am. Rep. 319.

or prepayment of freight is necessary, however, in the absence of law or notice to the shipper that it is required by the carrier's rules.³² Cotton delivered to a compress company, which is the carrier's agent for shipment when compressed, and the bills of lading for which have been presented to the carrier's agent, after the cotton has been checked by the compress company, and signature thereto refused by the carrier's agent because the insurance was insufficient, has been delivered to and accepted by the carrier, although it has not issued the bills of lading therefor.³³ But where cotton is still in the possession of a compress company at its sheds, and the carrier has never assumed possession or control of any cotton until it was placed on cars of the compress company, although it issued bills of lading in exchange for the receipts of the compress company, the carrier cannot be considered as having received it and is not liable as a common carrier;³⁴ and the rule is true although the carrier may not have issued bills of lading for the cotton.³⁵ So, where cotton was loaded on a car, left on a siding for that purpose by a railroad company, at a place where it had no station or agent, the car being loaded in the evening after the only local freight train for the day had passed, and there would be no other until the evening of the next day;³⁶ and where cotton was placed on a platform near its track which it did not own but constantly used, the cotton not having been received or receipted for by the company or taken under its control,³⁷ there was no delivery to and acceptance by the railroad company so as to make it

32. *Lord v. Maine Cent. R. Co.*, 105 Me. 255, 74 Atl. 117, where a shipper left goods for transportation at the freight depot of a carrier, delivering the same to a freight handler apparently in charge and accustomed to receive freight in the absence of the receiving clerk, the goods being properly packed and tagged with the consignee's name and destination, and the shipper was not requested to prepay the freight and supposed nothing further would be required preliminary to their transportation.

33. *Texas Midland R. Co. v. H. L.*

Edwards & Co. (Tex. Civ. App.) 121 S. W. 570.

34. *St. Louis, etc., R. Co. v. Commercial Union Ins. Co.*, 139 U. S. 223, 11 Sup. Ct. 554, 34 L. Ed. 154; *St. Louis, etc., R. Co. v. Knight*, 122 U. S. 79, 7 Sup. Ct. 1132, 30 L. Ed. 1077, 30 Am. & Eng. R. Cas. 88.

35. *Martin v. St. Louis, etc., R. Co.*, 55 Ark. 510, 19 S. W. 314, 56 Am. & Eng. R. Cas. 112.

36. *Tate v. Yazoo, etc., R. Co.*, 78 Miss. 842, 29 So. 392, 84 Am. St. Rep. 649.

37. *Brown v. Atlanta, etc., R. Co.*,

liable for the value of the cotton destroyed by fire under such circumstances. Where cotton was placed on a platform which had been built by a railroad for cotton for shipment, and, according to custom, the railroad's agent at the nearest station was requested to have a car sent for the cotton, but a train conductor failed to follow his instructions so that no car was sent, there was no relation of carrier and shipper.³⁸ Where goods designed for immediate shipment are placed in a condition to be carried, in the usual place of loading, in accordance with the custom of dealing between the carrier and the shipper, with the carrier's knowledge of the fact and purpose, or at the place of loading designated by the parties, there is both a sufficient delivery to and acceptance by the carrier.³⁹ Where a shipper had loaded and sealed cars on a switch track of the carrier for switching cars to and from the transfer tracks of other lines, and notified the carrier's agent and directed him to move the cars out, which the agent agreed to do, the carrier having adopted the custom of receiving loaded cars on its switching tracks, there was a sufficient delivery of the cars.⁴⁰ If goods are delivered to a carrier and received by it for shipment, they may be transmitted without the issuance of a bill of lading, and may be regarded as in the possession of the carrier from the time received, though there was no instruction nor intention that the carrier should immediately make the shipment.⁴¹ A deposit of goods in a carrier's freight depot, with an agreement that they should be shipped, is sufficient to make the carrier liable for their value when destroyed by fire or lost in transportation, although no

19 S. C. 39, 13 Am. & Eng. R. Cas. 479.

38. *Anderson v. Mobile & O. R. Co.*, — Miss. —, 38 So. 661. But see *St. Louis, etc., R. Co. v. Martin* (Tex. Civ. App.), 35 S. W. 28, holding that cotton placed for shipment on a platform kept by a carrier so that cotton to be shipped from that point may be weighed and placed thereon preparatory to being loaded on its cars is in possession of the carrier,

although it has not yet given a bill of lading therefor.

39. *Pittsburgh, etc., R. Co. v. American Tobacco Co.*, 31 Ky. Law Rep. 1013, 104 S. W. 377; *Pine Bluff & A. R. Ry. Co. v. McKenzie*, 75 Ark. 100, 86 S. W. 834.

40. *Kansas City Southern Ry. Co. v. Rosebrook-Josey Grain Co.*, (Tex. Civ. App.) 114 S. W. 436.

41. *Missouri, etc., R. Co., of Texas v. Beard*, 34 Tex. Civ. App. 188, 78 S. W. 253.

shipping bill or contract in writing was made.⁴² But, goods delivered to a common carrier by a cartman, and accepted by the agent of the company on the understanding that shipment is to be delayed until one of the articles can be properly crated, are held by the carrier in the capacity of warehouseman.⁴³ Where a railroad company furnished to a shipper a baggage car to be used in the transportation of theatrical goods, which was to be loaded by the shipper and notice given to the company when loaded, and part of the goods were not in the car and it was not intended to place them there until a subsequent day, the goods were not completely delivered to and received by the railroad company so as to impose on it the liability of a common carrier.⁴⁴ The delivery at and reception into a grain elevator of a shipper's grain, accompanied with notice to the carrier that it was there to await transportation, under contract, were equivalent to delivery to and reception by the carrier at its freight house, where a track extended into the yard of the grain elevator from the freight house and the owners of the elevator received and stored the grain at the shipper's expense until it was loaded into cars which the carrier from time to time ran into the yard and intrusted the owners of the elevator to load with the shipper's grain.⁴⁵ By agreement between a shipper and a carrier delivery of cars loaded by the shipper on a side track to the carrier may be understood to have taken place whenever the carrier removes the cars from the side track and places them in its freight trains for shipment, but the shipper's right to insist upon the carrier's promptly accepting goods tendered to it for transportation is not affected by such agreement, nor is the

42. *Meloche v. Chicago, etc., R. Co.*, 116 Mich. 69, 74 N. W. 301, 4 Det. Leg. N. 1066, 10 Am. & Eng. R. Cas. N. S. 182; *Gulf, etc., R. Co., v. Compton*, — Tex. Civ. App. —, 38 S. W. 220.

43. *Fisher v. Lake Shore, etc., R. Co.*, 17 Ohio C. C. 491, 9 Ohio C. D. 413.

44. *Clara Turner Co. v. New York, etc., R. Co.*, 86 Conn. 71, 84 Atl. 298. See *Colorado & S. Ry. Co. v. Breniman*, 22 Colo. App. 1, 125 Pac.

855, as to facts constituting delivery to and acceptance by a carrier.

45. *Thayer v. Burchard*, 99 Mass. 508.

The fact that a warehouseman weighed grain into cars which were taken to the docks, thence to be discharged into a vessel, and that each car was tallied by the mate, did not constitute a delivery of the grain to the shipmaster. *Glass v. Goldsmith*, 23 Wis. 488.

carrier's liability for its own negligence limited thereby.⁴⁶ An agreement by an agent of a carrier to have goods forwarded to their proper destination, from a point on a connecting line to which they were carried through the mistake of the shipper in addressing them, makes such carrier merely a gratuitous bailee of the goods.⁴⁷ Delivery to the carrier at the point of shipment is essential to create a contract by the carrier to carry and deliver.⁴⁸ Where a railroad station agent without authority to receive loose hay for transportation permitted a shipper to load hay into a car, and at once telegraphed to headquarters for instructions, and he was directed to refuse to receive the hay and he so at once informed the shipper, the carrier did not receive the hay for shipment.⁴⁹

§ 4. Constructive delivery.—Custom and usage.

In order to charge a common carrier with the loss of property, it is necessary that it should be delivered to it or its agent for transportation; but such delivery may be either actual or constructive.⁵⁰ The deposit of goods for shipment at a particular place, in pursuance of a custom or usage adopted or sanctioned by the carrier or its agent,⁵¹ or at a place where, by the constant practice and usage of the carrier, it receives property for trans-

46. *Bainbridge Grocery Co. v. Atlantic Coast Line R. Co.*, 8 Ga. App. 677, 70 S. E. 154. See also *Horne-Andrews Commission Co. v. Georgia R. Co.*, 136 Ga. 116, 70 S. E. 879.

47. *Treleven v. Northern Pac. R. Co.*, 89 Wis. 598, 62 N. W. 533.

48. *Marcus v. Chicago, etc., Ry. Co.*, 167 Ill. App. 638.

49. *Tilley v. Norfolk & W. Ry. Co.*, — N. C. —, 77 S. E. 994.

50. *Merriam v. Hartford & N. H. R. Co.*, 20 Conn. 354, 52 Am. Dec. 344; *Ball v. New Jersey Steamboat Co.*, 1 Daly (N. Y.) 491.

Where the agent of an express company at S. induced a bank at J., by fraud, to send money to a fictitious firm at S., and the express company

received and receipted for the package at J., and shipped it to S., where the agent embezzled it, the money sent was constructively in the possession of the express company, and could be recovered from it by the bank. *Jasper Trust Co. v. Kansas City, etc., R. Co.*, 99 Ala. 416, 14 So. 546, 42 Am. St. Rep. 75; *Southern Express Co. v. Jasper Trust Co.*, Id.

51. *Montgomery, etc., R. Co. v. Kolb*, 73 Ala. 396, 49 Am. Rep. 54, although no receipt is given by the agent to the shipper, and such usage or custom is contrary to the established regulations of the carrier, known to the shipper, and no notice thereof is traced to the superintendent or managing agent of the car-

portation,⁵² or at its usual place for receiving freight preparatory to shipment, and under an agreement previously made for transportation of the same,⁵³ may amount to constructive delivery to the carrier. If a carrier agree that property intended for transportation by it may be deposited at a particular place, without express notice to it, such deposit, merely, would amount to constructive notice, and a sufficient delivery.⁵⁴ Where, in accordance with usage, a cotton compress company's receipt is delivered by the owner to the carrier, and a bill of lading issued by the latter, the liability of the carrier to the owner begins, although the cotton is not yet actually delivered to the carrier.⁵⁵ But the mere delivery by the shipper to the carrier of warehouse receipts, together with an order on the warehouseman for delivery of the goods, to a common carrier, is not a constructive delivery of the goods to the carrier, so as to render it liable in case the goods are burned in the warehouse before it can remove the same.⁵⁶ Where, in pursuance of the custom of a carrier to move cars loaded by a shipper as soon as a blank receipt is made out by the shipper and signed by the conductor, a shipper loaded cotton on the carrier's car, made out such receipt, notified the carrier that the goods were ready for shipment and requested immediate removal, the delivery to the carrier was complete.⁵⁷ A carrier may, by virtue of a custom acquiesced in or sanctioned by it or by its course of dealing, be deemed to have been constructively in possession of goods placed

rier. *Ft. Worth, etc., R. Co. v. Martin*, 12 Tex. Civ. App. 464, 35 S. W. 21; *Barter v. Wheeler*, 49 N. H. 9, 6 Am. Rep. 434.

52. *Witzler v. Collins*, 70 Me. 290, 35 Am. Rep. 327.

53. *Bowie v. Baltimore & O. R. Co.*, 1 McArthur (D. C.) 94; *Evansville, etc., R. Co. v. Keith*, 8 Ind. App. 57, 35 N. E. 296; *Meyer v. Vicksburg, etc., R. Co.*, 41 La Ann, 639, 6 So. 218, 17 Am. St. Rep. 408, where the carrier's agent was notified of the deposit.

54. *Merriam v. Hartford & N. H. R. Co.*, 20 Conn. 354, 52 Am. Dec.

344, and such an agreement may be shown by proof of a constant practice and usage of the carrier to receive property left for transportation at such place, without any special notice of such deposit.

55. *Deming v. Merchants' Cotton-Press, etc., Co.*, 90 Tenn. (16 Pickle) 306, 17 S. W. 89, 13 L. R. A. 18; *Arthur v. Texas & P. Ry. Co.*, 204 U. S. 505, 27 Sup. Ct. 338, 51 L. Ed. 590.

56. *Stewart v. Gracy*, 93 Tenn. 314, 27 S. W. 664.

57. *St. Louis, etc., R. Co. v. Murphy*, 60 Ark. 333, 30 S. W. 419.

at a point at which it has been in the habit of receiving them or at which, by its course of conduct, it has led the shipper to believe that it would receive them.⁵⁸

§ 5. Question of law and fact.—Question for jury.

Where the facts are all admitted, the question whether or not the goods were actually delivered to a common carrier for transportation so as to fix his responsibility is one purely of law;⁵⁹ but where the evidence is conflicting, the question is one of fact to be determined by the jury under appropriate charges by the court.⁶⁰ It has also been held to be a mixed question of law and fact, usually proven by showing that the freight was sent to the place where it is the habit of the carrier to receive it, accompanied with notice to it that it is there for transportation.⁶¹ The question of a carrier's liability for an error in the shipment of goods by which they were sent to the wrong destination is one of law.⁶²

§ 6. Acceptance may be implied from proper tender.

It is the duty of a common carrier to accept for transportation all goods tendered to it for shipment upon a compliance by the shipper with all reasonable regulations, the prepayment of freight charges, if demanded, etc., as we have already shown.⁶³ An acceptance will, therefore, be implied upon proof of a proper tender of the goods, as, for example, where the carrier receives in its warehouse for transportation goods which are ready for immediate carriage, and it detains the goods in its warehouse for its own convenience;⁶⁴ where the goods have been placed in its depot

58. *W. G. Dunnington & Co. v. Louisville & N. R. Co.*, 153 Ky. 388, 155 S. W. 750.

59. *Gass v. New York, etc., R. Co.*, 99 Mass. 220, 96 Am. Dec. 742.

60. *Southwestern Co. v. Webb*, 48 Ala. 585; *Houston, etc., R. Co. v. Hodde*, 42 Tex. 467; and it is error for the court, in charging the jury, to call attention to certain testimony not disputed and say that the facts stated in it prove a delivery. See

also, *Great Western Despatch, etc., Line v. Glenny*, 41 Ohio St. 166.

61. *Bowie v. Baltimore & O. R. Co.*, 1 MacArthur (D. C.), 609.

62. *Richer v. Fargo*, 77 App. Div. (N. Y.) 550, 78 N. Y. Supp. 1007.

63. See *Duty to receive and carry*, § 2, chap. 3, *ante*.

64. *Moses v. Boston, etc., R. Co.*, 34 N. H. (4 Fost.) 71, 55 Am. Dec. 222; *Nichols v. Smith*, 115 Mass. 332; *Barter v. Wheeler*, 49 N. H. 9, 6 Am. Rep. 434.

or warehouse for shipment at its earliest convenience, and when nothing remains for the owners to do before shipment;⁶⁵ where the carrier offers to comply with a request for cars for the shipment of goods, and the owner of the goods places them at the usual place of loading goods at the carrier's station;⁶⁶ where goods have been delivered on the platform of a carrier's depot, which is its usual place for receiving freight preparatory for shipment, under an agreement previously made for transportation;⁶⁷ where goods are deposited in cars left on a switch by the carrier for the purpose of being loaded, the cars being under the exclusive control of the carrier.⁶⁸ But such tender or deposit of goods for shipment must have been at a time when and place where the carrier is accustomed to receive freight for transportation, and a tender or deposit elsewhere, for example, placing them where the carrier might easily have taken them in charge, is not a sufficient delivery to charge the carrier with responsibility for their safety other than as a warehouseman, if the carrier did not know it was intended that it should receive and ship them. There must have been an actual delivery of the goods to it or a constructive delivery, with notice of intention thereby to place them in its care and custody. If it refuses to accept the goods when tendered at a time and place other than where it is accustomed to receive freight, no liability of any kind will be incurred.⁶⁹

65. *Grand Tower Mfg., etc., Co. v. Ullman*, 89 Ill. 244.

66. *Evansville, etc., R. Co. v. Keith*, 8 Ind. App. 57, 35 N. E. 296.

67. *Bowie v. Baltimore, etc., R. Co.*, 1 McArthur (D. C.), 94.

68. *Illinois Cent. R. Co. v. Smyser*, 38 Ill. 254, 87 Am. Dec. 301.

Where goods to be shipped are situated upon a spur track of a railroad company, and the owner has no track scales, thus rendering it necessary to move the loaded cars to the company's depot for the purpose of weighing the same, so as to ascertain the proper amount of freight charges, the delivery of such cars will be

treated as having been made to the company at such depot. *Dixon v. Central of Georgia Ry. Co.*, 110 Ga. 173, 35 S. E. 369.

69. *O'Bannon v. Southern Express Co.*, 51 Ala. 481; *Houston, etc., R. Co. v. Hodde*, 42 Tex. 467; *Lovett v. Hobbs*, 2 Shows. 127; *Leigh v. Smith*, 1 C. & P. 640, 11 E. C. L. 507; *Selway v. Holloway*, 1 Ld. Raym. 48; *Buckman v. Levi*, 3 Campb. 414, wherein the deposit of goods in the yard of an inn from which the carrier started was held not to be a delivery.

A liability will attach if the tender or deposit at an unaccus-

§ 7. Deposit of goods elsewhere than at regular office or depot.

The deposit of goods in the vicinity of the depot or regular station of the carrier, or along or near the roadbed of the railway company, wayside deposits made to save the trouble of hauling to a regular station, or deposits anywhere except at the regular offices, stations, depots, or freighting or shipping points, or other places fixed by the carrier for the reception of freight, are at the risk of the owners, consignors, or shippers, and do not constitute such a delivery as will render the carrier liable for the safety of the goods while there and before being received into the actual custody and control of the carrier.⁷⁰ But custom or usage may

tomed place was made in pursuance of an agreement with the carrier. *Bowie v. Baltimore & O. R. Co.*, 1 McArthur (D. C.), 94.

The carrier also becomes responsible, if it consents to receive goods during a severe storm, which causes their loss, it being for the carrier to determine whether the goods could be safely received during the peril of a storm. *New Brunswick Steamboat, etc., Transp. Co. v. Tiers*, 24 N. J. Law (4 Zab.) 697, 64 Am. Dec. 394.

As to what is a "regular depot or station," within the meaning of a statute imposing a penalty on railroads for refusing to accept freight when tendered there, see *Land v. Wilmington, etc., R. Co.*, 104 N. C. 48, 10 S. E. 80, 40 Am. & Eng. R. Cas. 18.

70. *Ala.*—*O'Bannon v. Southern Express Co.*, 51 Ala. 481; *Louisville, etc., R. Co. v. Echols*, 97 Ala. 556, 12 So. 304, where cotton was left on a station platform over night in violation of the rules of the company, the latter was held not liable.

Del.—*Truax v. Philadelphia, etc., R. Co.*, 3 Houst. (Del.) 233, placing of fruit by its owner in a storehouse, belonging to a railroad company at a station, by permission of the com-

pany, for the shipper's own convenience, or placing it on the ground near the station without its being taken in charge by the company's agent, unless placed there by his direction, is not a sufficient delivery.

Ga.—*Wilson v. Atlanta, etc., R. Co.*, 82 Ga. 386, 9 S. E. 1076, 40 Am. & Eng. R. Cas. 25.

Iowa.—*Frazier v. Kansas City, etc., R. Co.*, 48 Iowa 571.

N. Y.—*Spade v. Hudson River R. Co.*, 16 Barb. (N. Y.) 383.

N. C.—*Wells v. Wilmington, etc., R. Co.*, 51 N. C. (6 Jones L.) 47, 72 Am. Dec. 556.

S. C.—*Brown v. Atlanta, etc., Air Line R. Co.*, 19 S. C. 39, 13 Am. & Eng. R. Cas. 479.

Tex.—*Houston, etc., R. Co. v. Hodde*, 42 Tex. 467; *Fort Worth, etc., R. Co. v. Riley* (Tex. Civ. App.), 1 S. W. 446, 27 Am. & Eng. R. Cas. 49, placing cattle in the yards of a railroad company, under permission of the station agent, where they are not received for shipment and no bill of lading is given, does not constitute a delivery; *Yoakum v. Dryden* (Tex. Civ. App.), 26 S. W. 312, loading goods on a car standing on a side track at the carrier's depot, without

have established a constructive delivery which will bind the carrier, as where proof is made of a constant and habitual practice and usage of a carrier to accept goods for shipment when deposited at a particular place, without express notice to the carrier of such deposit. This is held to be sufficient to show a public offer by the carrier to receive in that way and to constitute an agreement between the parties by which the goods, when so deposited, shall be considered as delivered to the carrier without further notice.⁷¹ So a special place for receipt of freight may be fixed by custom and a tender of delivery there is sufficient to charge the carrier with liability.⁷² But actual notice of the deposit of goods for shipment at such places must be given to the carrier, except where there is an agreement or usage by which goods deposited at a particular place are to be taken charge of by the carrier without any special notice of such deposit.⁷³ Upon a proper delivery and ac-

the knowledge of its agent, and when the agent on being informed of it, declined to ship the goods, does not constitute a delivery to the carrier, there being no custom under which such loading constituted a delivery.

A deposit at a place on the line of a railroad where there is a switch, but neither agent, station, nor platform, and where shipments are made only by loading directly upon the cars, and where freight is delivered when the parties are ready to receive it, is not a depot or station, and a deposit near such switch does not constitute a delivery. *Kansas City, etc., R. Co. v. Lilly*, (Miss.) 8 So. 644, 45 Am. & Eng. R. Cas. 379; *Louisville, etc., R. Co. v. Flanagan*, 113 Ind. 488, 3 Am. St. Rep. 674.

Private switch.—A common carrier cannot be required to receive freight on or along a private switch. *Bedford-Bowling Green Stone Co. v. Oman*, 134 Fed. 441, *affd.* *Oman v. Bedford-Bowling Green Stone Co.*, 134 Fed. 64, 67 C. C. A. 190.

71. *Montgomery, etc., R. Co. v. Kolb*, 73 Ala. 396, 49 Am. Rep. 54, 18 Am. & Eng. R. Cas. 512; *Merriam v. Hartford & N. H. R. Co.*, 20 Conn. 354, 52 Am. Dec. 344; *Meyer v. Vicksburg, etc., R. Co.*, 41 La. Ann. 639, 6 So. 218, 17 Am. St. Rep. 408; *Fort Worth, etc., R. Co. v. Martin*, 12 Tex. Civ. App. 464, 35 S. W. 21; (in the two cases last cited the deposit of cotton on a railway platform was held a delivery); *Converse v. Norwich, etc., Transp. Co.*, 33 Conn. 166; *Green v. Milwaukee, etc., R. Co.*, 38 Iowa 100, 41 Iowa 410; *Evansville, etc., R. Co. v. Keith*, 8 Ind. App. 57, 35 N. E. 296.

72. *Galena, etc., R. Co. v. Rae*, 16 Ill. (8 Peck), 488, 68 Am. Dec. 574. But usage or custom may be limited, and a custom as to the delivery of a trunk as baggage will not extend to its delivery as freight. *Wright v. Caldwell*, 3 Mich. 51.

73. *Grosvonor v. New York Cent. R. Co.*, 39 N. Y. 34; *Packard v. Getman*, 6 Cow. (N. Y.) 758, 16 Am.

ceptance of goods the common law liability of a common carrier immediately attaches and the carrier is liable to the same extent as if the goods were in transit, unless its liability has been modified, limited, or restricted by special contract or agreement with the shipper or owner of the goods.⁷⁴

§ 8. Delivery to agent of carrier.—Authority of agent to receive goods.

A delivery of goods for shipment to an agent of the carrier or a person duly authorized to act in its behalf,⁷⁵ or who is clothed with apparent authority and has been accustomed to receive goods tendered for transportation,⁷⁶ is a sufficient delivery to bind the

Dec. 475, 4 Wend. (N. Y.) 615; *Salinger v. Simmons*, 57 Barb. (N. Y.) 513; *Illinois Cent. R. Co. v. Smyser*, 38 Ill. 354, 87 Am. Dec. 301; *Buckman v. Levi*, 3 Campb. 414; *Merriam v. Hartford, etc., R. Co.*, 20 Conn. 354, 52 Am. Dec. 344; *Montgomery, etc., R. Co. v. Kolb*, 73 Ala. 396, 49 Am. Rep. 54, 18 Am. & Eng. R. Cas. 512; *Converse v. Norwich, etc., Transp. Co.*, 33 Conn. 166 (the last two cases involved delivery as between connecting carriers).

74. *Pittsburgh, etc., R. Co. v. Barrett*, 36 Ohio St. 448, 3 Am. & Eng. R. Cas. 259; *Grosvenor v. New York Cent. R. Co.*, 39 N. Y. 34; *Gleason v. Goodrich Transp. Co.*, 32 Wis. 85, 14 Am. Rep. 716; *Ford v. Mitchell*, 21 Ind. 54; *Trowbridge v. Chapin*, 23 Conn. 595.

75. *Dak.*—*Waldron v. Chicago, etc., R. Co.*, 1 Dak. 336.

Del.—*Truax v. Philadelphia, etc., R. Co.*, 3 Houst. (Del.) 233.

Iowa.—*Cobb v. Illinois Cent. R. Co.*, 38 Iowa, 601.

Mass.—*Nichols v. Smith*, 115 Mass. 332.

Mo.—*Milne v. Chicago, etc., R. Co.*,

155 Mo. App. 465, 135 S. W. 85; *Minter v. Pacific R. Co.*, 41 Mo. 508, 97 Am. Dec. 288.

N. H.—*Mayall v. Boston & M. R. Co.*, 19 N. H. 122, 49 Am. Dec. 149.

N. Y.—*Grosvenor v. New York Cent. R. Co.*, 39 N. Y. 34, 5 Abb. Prac. (N. S.) 345; *Rogers v. Wheeler*, 52 N. Y. 262, 4 Am. Ry. Rep. 411, affg. 6 Lans. 420.

N. C.—*Harrell v. Wilmington & W. R. Co.*, 106 N. C. 258, 11 S. E. 286, 42 Am. & Eng. R. Cas. 421.

Wis.—*Gleason v. Goodrich Transp. Co.*, 32 Wis. 85, 14 Am. Rep. 716.

Eng.—*Winkfield v. Packington*, 2 C. & P. 599, 12 E. C. L. 281; *Giles v. Taff Vale R. Co.*, 2 El. & Bl. 823, 75 E. C. L. 823.

76. *Me.*—*Lord v. Maine Central R. Co.*, 105 Me. 255, 74 Atl. 117, a freight handler apparently in charge and accustomed to receive freight in the absence of the receiving clerk.

Mass.—*Phillips v. Earle*, 25 Mass. (8 Pick.) 182, the agent of a stage company, although the delivery is made to him at a place other than the regular office of the company, by his direction.

carrier and render it liable as a common carrier. A delivery may also be sufficient when made to an employe in pursuance of some special contract or usage.⁷⁷ But a delivery to a person working around the freight house of a railroad company;⁷⁸ to the driver of a stage coach who promised to deliver it to the next stage agent;⁷⁹ to the ticket master of a passenger train who had no authority to receive freight;⁸⁰ to a waggoner to carry for his own gain, and not for the profit of the master;⁸¹ to the driver of a wagon unauthorized to receive goods to haul;⁸² to the deck

N. H.—*Bean v. Sturtevant*, 8 N. H. 146, 28 Am. Dec. 389, driver of stage coach.

N. Y.—*Witbeck v. Schuyler*, 44 Barb. (N. Y.) 469, the captain of a steamboat, although there may have been a freight agent of the boat in the same town, where it appears that the consignor did not know of the agent; *Coyle v. Western R. Corp.*, 47 Barb. (N. Y.) 152, employes of a railroad company, when the receiving clerk is present and directs disposition of the goods. *Lewis v. Van Horn*, 24 Misc. Rep. (N. Y.) 765, 53 N. Y. Supp. 546, expressman in charge of express wagon bearing name of carrier and which called at plaintiff's place every night for goods to be delivered. See also, *Abrams v. Platt*, 52 N. Y. Supp. 153, 23 Misc. Rep. (N. Y.) 637.

S. C.—*McClure v. Richardson*, 1 Rice (S. C.) 215, 33 Am. Dec. 105.

Tex.—*Pacific Express Co. v. Black*, 8 Tex. Civ. App. 363, 27 S. W. 830, a person in charge of the depot of a railroad company, for the express company.

Vt.—*Landon v. Proctor*, 39 Vt. 78.

W. Va.—*Quarrier v. Baltimore, etc.*, R. Co., 20 W. Va. 424, 18 Am. & Eng. R. Cas. 536, a porter at a railway station.

Eng.—*Pickford v. Grand Junction R. Co.*, 12 M. & W. 766; *Wilson v. York, etc.*, R. Co., 17 L. T. 223, officials of a railroad company at its station; *Cobban v. Downe*, 5 Esp. N. P. 41, the mate of a ship; *McCourt v. London, etc.*, R. Co., 3 Ir. R. C. L. 107; *Machu v. London, etc.*, R. Co., 2 Exch. 415, 17 L. J. Exch. 271, a person accustomed to book for the company; *Davey v. Mason*, 41 E. C. L. 30; *Hart v. Baxendale*, 6 Exch. 769, draymen of a railroad company collecting goods and packages at the houses of consignors.

77. *Trowbridge v. Chapin*, 23 Conn. 595.

78. *Butler v. Hudson River R. Co.*, 3 E. D. Sm. (N. Y.) 571; *Young v. Canadian Pac. R. Co.*, 1 Manitoba L. Rep. 205.

79. *Fisher v. Geddes*, 13 La. Ann. 14; *Blanchard v. Isaacs*, 3 Barb. (N. Y.) 388.

80. *Porter v. Chicago, etc.*, R. Co., 41 Iowa 358; *Elkins v. Boston, etc.*, R. Co., 23 N. H. (3 Fost.) 275.

81. *Butler v. Basing*, 2 C. & P. 613, 12 E. C. L. 287; *Williams v. Cranston*, 2 Stark, 82, 3 E. C. L. 326.

82. *Jenkins v. Pickett*, 17 Tenn. (9 Yerg.) 480.

hands of a steamboat, unless it is shown that they are authorized to receive freight, or that the same is delivered to them in pursuance of some special contract or usage,⁸³ is not a sufficient delivery to render the carrier liable as a common carrier for the loss of the goods. A carrier is liable for the negligence of his servants or agents in taking goods on board his vessel in his absence, although he may have specifically directed them not to receive goods, it appearing that the shipper had no notice of such directions.⁸⁴ Where the carrier sends an agent to receive the goods, instructions given to him by the shipper form a part of the contract of affreightment.⁸⁵ The carrier is responsible for the acts of its agent, where authority is vested in him to act for the carrier, or where the acts are performed within the scope of an apparent authority which the carrier allows him to assume, and it will be bound by a delivery made to him under such circumstances, and notice to such agent is notice to the principal.⁸⁶ The station agent of a railroad company, or the agent of an express company, is presumed to have authority to receive goods offered for transportation when the goods are tendered at the station or office of the company, or regular place for the reception of goods for shipment; but where the tender of freight for shipment is not made at the station or office but at a point remote therefrom the authority of the agent must be clearly proved.⁸⁷ So persons dealing with railroad corporations and parties en-

83. *Ford v. Mitchell*, 21 Ind. 54.

84. *Street v. Morrison*, 10 New Bruns. 296.

85. *Uptegrove v. Central R. Co.*, 16 Misc. Rep. (N. Y.) 14, 37 N. Y. Supp. 659.

86. *Rogers v. Long Island R. Co.*, 2 Lans. (N. Y.) 269, *affd.* 56 N. Y. 620; *Witbeck v. Schuyler*, 44 Barb. (N. Y.) 469, 31 How. Prac. 97; *Harrell v. Wilmington & W. R. Co.*, 106 N. C. 258, 110 E. 286; 42 Am. & Eng. R. Cos. 417; *Montgomery, etc., R. Co. v. Kolb*, 73 Ala. 396, 40 Am. Rep. 54, 18 Am. & Eng. R. Cas. 518; *Minter v. Pacific R. Co.*, 41 Mo. 508, 97 Am.

Dec. 288; *Ouimit v. Henshaw*, 35 Vt. 605, 84 Am. Dec. 646; *Gelvin v. Kansas City, etc., R. Co.*, 21 Mo. App. 273.

87. *Cronkite v. Wells*, 32 N. Y. 247, a delivery to the clerk of an express company's agent for transportation, outside the agent's office, will not render the company liable for loss of the goods before they come into the actual possession of its agent; *Missouri Coal & Oil Co. v. Hannibal, etc., R. Co.*, 35 Mo. 84; *Dwight v. Brewster*, 1 Pick. (Mass.) 50, 11 Am. Dec. 133; *Southern Express Co. v. Newby*, 36 Ga. 635, 91 Am. Dec. 783.

gaged in the transportation of freight have a right to consider that those usually employed in the business of receiving and forwarding it have ample authority to deal with them. It is enough to establish a delivery in the first instance, to prove that a person thus acting received and accepted the property for the purpose of transportation, and even though it subsequently appears that another employe was actually the agent having charge of this department of the business, yet the company who sanction the performance of this duty by other persons in their employ, and thus hold out to the world that they are authorized agents, are not at liberty to relieve themselves from responsibility by repudiating their acts.⁸⁸

§ 9. Bill of lading not essential to constitute delivery.

Under the common law the obligation to safely carry and deliver goods received for transportation is implied from the acceptance of the goods by the carrier for that purpose, without any written contract of carriage, and it is not necessary that the carrier shall have made out and delivered to the shipper a receipt or bill of lading for the goods in order to constitute a complete delivery to the carrier; and this rule prevails in the absence of a statutory rule otherwise.⁸⁹ The obligation of a common carrier is fixed by law, and is as much a part of the contract of shipment

88. *Grosvenor v. New York Cent. R. Co.*, 39 N. Y. 34, 5 Abb. Prac. (N. S.) 345.

89. *Grosvenor v. New York Cent. R. Co.*, 39 N. Y. 34, 5 Abb. Pr. N. S. (N. Y.) 345; *Salinger v. Simmons*, 57 Barb. (N. Y.) 513, 8 Abb. Pr. N. S. (N. Y.) 409; *Packard v. Getman*, 6 Cow. (N. Y.) 757, 16 Am. Dec. 475; *Shelton v. Merchant's Despatch Transp. Co.*, 36 N. Y. Super. Ct. 527; *Lakeman v. Grinnell*, 18 N. Y. Super. (5 Bosw.) 625; *St. Louis, etc., R. Co. v. Neel*, 56 Ark. 279, 55 Am. & Eng. R. Cas. 428; *Montgomery, etc., R. Co. v. Kolb*, 73 Ala. 396, 49 Am.

Rep. 54, 18 Am. & Eng. R. Cas. 512, and the rule prevails even where there is a statute making it compulsory on common carriers to give receipts and bills of lading for goods; *Illinois Cent. R. Co. v. Smyser*, 38 Ill. 354, 87 Am. Dec. 301; *Toledo, etc., R. Co. v. Gilvin*, 81 Ill. 511; *Louisville, etc., R. Co. v. McGuire*, 79 Ala. 395, and the carrier's receipt of the goods may be proven without the production of the bill of lading or accounting for its absence. *Gulf, etc., R. Co. v. Compton* (Tex. Civ. App.), 38 S. W. 220; *Lord v. Maine Cent. R. Co.*, 105 Me. 255, 74 Atl. 117.

as though written therein.⁹⁰ And the mere receipt of a bill of lading does not alter or affect a prior contract, under which goods have been actually shipped and are in course of transit, without an actual consent to the change.⁹¹ In the absence of evidence to the contrary, it is to be assumed that goods accepted by a carrier for transportation are taken under the responsibility cast upon the carrier by the common law, save as modified by the statute, and the carrier's liability, therefore, begins at the time of its acceptance of the complete control and possession of the goods, with no restrictions by the shipper as to the time of transportation, and not at the time of the bill of lading.⁹² But the bills of lading will displace the common law relation and control the rights of the parties, when subsequently obtained in the usual or customary course of business and expressing the intentions or engagements of the parties, or when they have otherwise been assented to in fact or law by the shipper or owner of the goods.⁹³ A statutory provision that the transportation of goods by a common carrier shall be considered as commenced from the time the bill of lading is signed, does not preclude the liability from commencing from the time of the delivery of the goods.⁹⁴

90. *Evansville, etc., R. Co. v. Kevekordes* (Ind. App.), 69 N. E. 1022.

91. *Farmers' Loan & Trust Co. v. Northern Pac. R. Co.*, 120 Fed. 873, 57 C. C. A. 533.

92. *Park v. Preston*, 108 N. Y. 434, 15 N. E. 705; *Cragin v. New York Cent. R. Co.*, 51 N. Y. 63, 10 Am. Rep. 559; *Rubens v. Ludgate Hill Steamship Co.*, 20 N. Y. Supp. 481; *Aiken v. Chicago, etc., R. Co.*, 68 Iowa 363, 25 Am. & Eng. R. Cas. 377; *St. Louis, etc., R. Co. v. Neel*, 56 Ark. 279; *Brown v. The Water Witch*, Fed. Cas. No. 1971; *Snow v. Caruth*, Fed. Cas. No. 13144 (15 Spr. 324) 19 S. W. 963, 55 Am. & Eng. R. Cas. 428; *Meloche v. Chicago, etc., R. Co.*, 116 Mich. 69, 74 N. W.

301, 10 Am. & Eng. R. Cas. N. S. 182.

A carrier's liability begins when it receives freight for immediate shipment, and is not dependent upon the issuance of the bill of lading. *Garner v. St. Louis, I. M. & S. Ry. Co.*, 79 Ark. 353, 96 S. W. 187.

93. *Shelton v. Merchants' Dispatch Transp. Co.*, 59 N. Y. 258; *revg.* 36 N. Y. Super. 527; *Mills v. Michigan Cent. R. Co.*, 45 N. Y. 622, 6 Am. Rep. 152.

94. *East Line, etc., R. Co. v. Hall*, 64 Tex. 620; *Gulf, etc., R. Co. v. Trawick*, 80 Tex. 270; *International, etc., R. Co. v. Dimmit County Pasture Co.*, 5 Tex. Civ. App. 186; *Texas Pac. R. Co. v. Nicholson*, 61 Tex. 491; *Martin v. Fort Worth, etc., R.*

§ 10. Bill of lading as an evidence of delivery.

The issuance of a bill of lading is *prima facie* evidence of a delivery to the carrier, when issued by its agent having actual or apparent authority to issue it, except where there is an express understanding that the carrier shall not be liable until actual delivery is made.⁹⁵ But the fact that a bill of lading has been issued by the carrier is not conclusive proof that the goods for which it was issued had been delivered to the carrier.⁹⁶ A bill of lading is both a receipt and a contract of carriage. As proof of the actual taking of possession by the carrier the bill stands as a mere receipt, subject to rebuttal or explanation, by showing that it was not the intention of the parties to make any change in the actual or legal custody of the goods;⁹⁷ or by showing that the goods actually delivered were different from those stated in the bill of lading.⁹⁸ When actual delivery has not been made to the carrier, but the goods remain in the possession of the shipper or his agent, although a bill of lading has been issued

Co., 3 Tex. Civ. App. 556. *Contra*: Missouri Pac. R. Co. v. Douglass, 2 Tex. Civ. App. Cas. 27, 2 Willson Civ. Cas. Ct. App. 32, 16 Am. & Eng. R. Cas. 98; Texas, etc., R. Co. v. Wheat, 2 Tex. Civ. App. Cas., § 164. As to statute compelling carrier to issue bill of lading describing the goods, see Texas, etc., R. Co. v. Cushman (Tex. App.), 14 S. W. 1069; Schloss v. Atchison, etc., R. Co., 85 Tex. 601.

95. Burwell v. Raleigh, etc., R. Co., 94 N. C. 451, 25 Am. & Eng. R. Cas. 410; Milne v. Chicago, etc., R. Co., 155 Mo. App. 465, 135 S. W. 85; Capehart v. Granite Mills, 97 Ala. 353, 12 So. 44.

A bill of lading is evidence of a shipment, as between the carrier and shipper. Flower v. Downs, 12 Rob. (La.) 101.

96. Martin v. St. Louis, etc., R. Co., 55 Ark. 510, 19 S. W. 314, 56 Am. & Eng. R. Cas. 112, so held, al-

though the issuing of bills of lading except for goods actually in the possession of the carrier was forbidden by statute; St. Louis, etc., R. Co. v. Commercial Union Ins. Co., 139 U. S. 223, 11 Sup. Ct. 554, 35 L. Ed. 154, 49 Am. & Eng. R. Cas. 137; California Ins. Co. v. Union Compress Co., 133 U. S. 387, 10 Sup. Ct. 365, 33 L. Ed. 730; St. Louis, etc., R. Co. v. Knight, 123 U. S. 79, 7 Sup. Ct. 1132, 30 L. Ed. 1077, 30 Am. & Eng. R. Cas. 88; Marine Ins. Co. v. St. Louis, etc., R. Co., 41 Fed. 643, 43 Am. & Eng. R. Cas. 79. But see Deming v. Merchants' Cotton-Press, etc., Co., 90 Tenn. 306, 17 S. W. 89, 13 L. R. A. 518; Otis Co. v. Missouri Pac. R. Co., 112 Mo. 622, 20 S. W. 676, 55 Am. & Eng. R. Cas. 636.

97. Cunard S. S. Co. v. Kelley (U. S. C. C. A. Mass.), 115 Fed. 678, 53 C. C. A. 310.

98. Southern Ry. Co. v. Allison, 115 Ga. 635, 42 S. E. 15.

and has passed into the hands of an innocent purchaser for value, the carrier is not liable for a loss of the goods.⁹⁹ The general rules as to what constitute a delivery to the carrier are not changed by statutes providing that bills of lading shall not be issued unless the goods have already been actually delivered to the carrier. A delivery at the point of shipment, to a car not under the control or in possession of the carrier issuing the bill of lading, is not such a delivery as to authorize the issuance of the bill, and a bill of lading issued under such circumstances is void and a transfer of it passes no title to the goods.¹

§ 11. Duty to issue bill of lading.

In an early case in Massachusetts it was held that there was no law requiring a railroad company to issue bills of lading for goods delivered to be transported.² It was also held in Alabama that a railroad company could not be compelled to give a bill of lading making it responsible for freight beyond its line.³ And in Georgia a statute, which prescribes a penalty for the refusal of a railroad to receive and transport to any point on its own line cars containing freight offered to it by a connecting road of the same gauge, was held not to require a railroad to issue through bills of lading to points on a connecting line, and to deliver its own cars containing freight to such connecting line; and the fact that it has issued such through bills of lading to shippers at a certain point gave no right to shippers at another point to demand that they be likewise issued to them.⁴ But it has been recently held in Texas that a carrier is compelled to issue to the shipper a bill of lading for goods intrusted to it for shipment.⁵ And a recent Georgia case holds that after there

99. *Missouri Pac. R. Co. v. McFadden*, 154 U. S. 155, 14 Sup. Ct. 990, 38 L. Ed. 944, 67 Am. & Eng. R. Cas. 163. Compare *Otis Co. v. Missouri Pac. R. Co.*, 112 Mo. 622, 20 S. W. 676, 55 Am. & Eng. R. Cas. 636. See also, *The Lady Franklin*, 8 Wall. (U. S.) 325; *Hubbersty v. Ward*, 8 Exch. 330; *Grant v. Norway*, 10 C. B. 665, 70 E. C. L. 665.

1. *Martin v. St. Louis, etc., R. Co.*,

55 Ark. 510, 19 S. W. 314, 56 Am. & Eng. R. Cas. 112; *Aetna Nat. Bank v. Water Power Co.*, 58 Mo. App. 532.

2. *Johnson v. Stoddard*, 100 Mass. 306.

3. *Lotspeich v. Central Railroad, etc., Co.*, 73 Ala. 306.

4. *Coles v. Central Railroad, etc., Co.*, 86 Ga. 251, 12 S. E. 749.

5. *R. W. Williamson & Co. v.*

has been a constructive delivery of freight to a common carrier under a local custom prevailing at a station where it has no agent, a shipper making such delivery is entitled to a receipt for the freight, though the carrier previously by mistake issued a receipt therefor to a person not entitled to be recognized as a consignor.⁶

§ 12. Loading goods on cars.

It is the duty, generally, of a railroad company to load the freight delivered to it for transportation into its cars, and it cannot, generally, devolve this duty by any regulation upon the shipper; it cannot legally, as a condition of transportation generally, exact from the shipper a contract to place the freight into its cars.⁷ Where, by the contract of carriage, the shipper undertakes to load the freight into the cars, or vessel, this does not constitute such an interference by the shipper with the carrier's exclusive possession and control as to postpone the time when the carrier takes on the character of a common carrier, and the carrier's liability attaches at the time the freight is offered for carriage and accepted, although the loading of the freight remains to be done by the shipper.⁸ The carrier is responsible for

Texas & P. Ry. Co. (Tex. Civ. App.), 138 S. W. 807.

6. Atlantic & B. Ry. Co. v. Howard Supply Co., 125 Ga. 478, 54 S. E. 530.

7. London, etc., Fire Ins. Co. v. Rome, etc., R. Co., 144 N. Y. 200, 39 N. E. 79, 43 Am. St. Rep. 752, 61 Am. & Eng. R. Cas. 225, affg. 68 Hun (N. Y.), 598, 23 N. Y. App. 231; Doan v. St. Louis, etc., R. Co., 38 Mo. App. 408; St. Louis, etc., R. Co. v. Martin (Tex. Civ. App.), 35 S. W. 28.

8. London, etc., Fire Ins. Co. v. Rome, etc., R. Co., *supra*; Fitchburg, etc., R. Co. v. Hanna, 72 Mass. (6 Gray) 539, 66 Am. Dec. 427; Merritt v. Old Colony, etc., R. Co., 93 Mass. (11 Allen) 80; Bulkley v. Naumkeag Steam Cotton Co., 24 How. (U. S.) 386, 16 L. Ed. 599; The Bark Edwin,

1 Sprague (U. S.), 477; The Oregon, Deady (U. S.), 179; Grant v. Norway, 2 Eng. L. & Eq. 337, 10 C. B. 665, 70 E. C. L. 665, 15 Jur. 296; Greenwood v. Cooper, 10 La. Ann. 796.

The carrier's liability is not necessarily affected by the fact that the shipper loaded his own goods. Hannibal, etc., R. Co. v. Swift, 79 U. S. (12 Wall.) 262, 20 L. Ed. 423.

The shipper is not entitled to recover of the carrier the cost of employing hands for the purpose of loading goods for transportation, where it is the custom for the shipper to furnish the hands for such purpose and the custom has been acquiesced in. Reed v. Philadelphia, etc., R. Co., 3 Houst. (Del.) 176.

an injury to the goods occurring while they are being loaded into the cars, where the shipper has not undertaken or contracted to load them for himself.⁹ A shipper who, to save charges or for his own convenience, or any other reason, loads the property himself is not the agent of the carrier in so doing and the latter is not responsible for his negligence in loading the car.¹⁰ But the carrier is liable if it undertakes to load the goods and allows them to be injured through a want of care on its part, even where it is the shipper's duty to load them.¹¹

§ 13. Proof of delivery to the carrier.

In an action against a carrier to recover for the loss of goods or an injury to them by delay in transportation or otherwise, the first essential to establish the liability of the carrier is proof of the delivery of the goods to the carrier and the acceptance thereof by the carrier for immediate transportation.¹² Such proof is furnished by testimony showing the facts necessary to constitute a delivery and acceptance by the carrier, as set forth in preceding sections of this chapter.¹³ As has already been shown, the bill of lading is *prima facie* evidence of a delivery, but is not conclusive evidence.¹⁴ Shipping receipts, bills for freight charges, and other writings evidencing an exercise of possession and control of the goods by the carrier, are *prima facie* evidence of the facts recited therein; but the carrier may show the true facts by oral testimony.¹⁵ The burden of proof to establish a delivery is on the plaintiff in an action against the carrier for the loss of or injury to the goods.¹⁶ Where the delivery of the goods for transportation is denied by the carrier, it is sufficient

9. *Merritt v. Old Colony, etc., R. Co.*, 93 Mass. (11 Allen) 80; *Gilbert v. N. Y. Cent., etc., R. Co.*, 4 Hun (N. Y.), 378, 6 Thomp. & C. (N. Y.) 662; *Whitman v. Western Counties R. Co.*, 17 Nova Scotia, 405; *Thomas v. Ray*, 4 Esp. N. P. 262.

10. *Pennsylvania Co. v. Kenwood Bridge Co.*, 170 Ill. 645, 49 N. E. 215, 9 Am. & Eng. R. Cas. N. S. 556, revg. judg. 65 Ill. App. 145.

11. *Kimball v. Western R. Corp.*, 72 Mass. (6 Gray) 542.

12. See § 1, *ante*.

13. See §§ 2 to 9, *ante*.

14. See § 10, *ante*.

15. *Union Pac. R. Co. v. Hepner*, 3 Colo. App. 313; *Seller v. Steamship Pacific*, 1 Or. 409; *Schloss v. Atchison, etc., R. Co.*, 85 Tex. 601; *Horseman v. Grand Trunk R. Co.*, 31 U. C. Q. B. 535.

16. See Burden of proof, chap. 14.

for the plaintiff to show that the goods were delivered to a person and at a place where goods were accustomed to be left by the carrier, and whether such person was paid anything or not is immaterial.¹⁷

17. *Burrell v. North*, 2 C. & K. 681, 61 E. C. L. 681.

CHAPTER V.

TERMINATION OF LIABILITY.—DELIVERY BY CARRIER.

- SECTION**
1. Termination of carrier's liability.
 2. Unloading and storing goods.
 3. Liability for injury while goods are being unloaded.
 4. Delivery must be made to the consignee or his agent.
 5. Delivery may always be made to the true owner of the goods.
 6. Delivery to fraudulent purchaser.
 7. Delivery of goods sent in care of carrier's local agent.
 8. Consignor's right to change of consignee.
 9. Delivery to holder of bill of lading.
 10. Carrier entitled to demand bill of lading.
 11. Carrier's liability to innocent purchaser of bill of lading.
 12. Laches of holder of bill of lading.
 13. Goods received from connecting carrier.
 - 13a. Where stoppage in transitu is provided.
 14. Stoppage in transitu as a defense.
 15. Holder of bill of lading has priority over creditors.
 16. Effect of the word "notify" in a bill of lading.
 17. Bill of lading attached to draft.
 18. Effect of bill of lading as estoppel.
 19. Duplicate bills of lading.
 20. Necessity of endorsement of bill of lading.
 21. Carrier's liability for misdelivery.
 22. Delivery to one of two persons of the same name.
 23. Place of delivery.
 24. Right of owner or consignee to change place of delivery.
 25. Statutory requirements as to delivery of grain.
 26. When place of destination is not on carrier's line.
 27. Time of transportation and delivery in general.
 28. When personal delivery is required. The common law rule. **Rule**
as to express companies.
 29. When personal delivery is required. Carriers by rail.
 30. Delivery by carriers by water.
 31. Delivery where consignee refuses to receive.
 32. Delivery of goods sent C. O. D.
 33. Confusion of goods.
 34. Statutory penalties for refusing to deliver promptly.
 35. Demand of goods by consignee.
 36. Waiver of right of action for wrongful delivery.
 37. Right of carrier to demand receipts upon delivery.

§ 1. Termination of carrier's liability.

The carrier's undertaking is to deliver the goods transported by it in safety as well as to carry safely, and its responsibility ceases when the delivery of the goods is completed either by an actual, or a constructive or legal, delivery to the owner or consignee, or his agent, or by a deposit in a reasonably safe warehouse, after the consignee has had reasonable time in which to call for and remove the goods ready to be delivered to the consignee on demand. The carrier's liability cannot end until that of the owner, consignee or warehouseman begins.¹ The warranty of the car-

1. Ala.—South & North Alabama R. Co. v. Wood, 66 Ala. 167, 9 Am. & Eng. R. Cas. 419; Greek-American Produce Co. v. Illinois Cent. R. Co., 4 Ala. App. 377, 58 So. 994; Central of Ga. Ry. Co. v. Burton, 165 Ala. 425, 51 So. 643.

Ga.—Georgia Ry. Co. v. Pound, 111 Ga. 6, 36 S. E. 312.

Kan.—Missouri Pac. Ry. Co. v. L. Newburger & Bro., 67 Kan. 846, 73 Pac. 67.

Ill.—Schumacher v. Chicago & N. W. Ry. Co., 108 Ill. App. 520, judg. affd. 207 Ill. 199, 69 N. E. 825, a railroad company, after the expiration of a reasonable time given to the shipper to move his goods, may terminate its liability as a common carrier by unloading and storing the goods in its warehouse, thereby assuming the liability of a warehouseman only, and may have a lien for a reasonable storage charge; Chicago, etc., R. Co. v. Kendall, 73 Ill. App. 105, the liability of a railroad company as a common carrier of freight ceases upon the delivery of the car containing the freight on its side track in the usual and customary place for unloading by consignees; Michigan Southern, etc., R. Co. v. Day, 20 Ill. 375, 71 Am. Dec. 278;

Chicago, etc., R. Co. v. Warren, 16 Ill. 502, 63 Am. Dec. 317; American Express Co. v. Baldwin, 26 Ill. 504.

N. Y.—DeMott v. Laraway, 14 Wend. (N. Y.) 225, 28 Am. Dec. 523.

Me.—Stone v. Waite, 31 Me. 409, 52 Am. Dec. 621; Parker v. Flagg, 26 Me. 181.

Ohio.—McGregor v. Kilgore, 6 Ohio, 358, 27 Am. Dec. 260.

Miss.—Erschino v. Thames, 6 Miss. 371.

Md.—United Fruit Co. v. Baltimore Transp. Co., 104 Md. 567, 65 Atl. 415.

N. H.—Smith v. Nashua, etc., R. Co., 7 Fort. (N. H.) 86.

Pa.—Groff v. Bloomer, 9 Pa. St. 114.

N. J.—Bobbink v. Erie R. Co., 82 N. J. 547, 82 Atl. 877.

S. C.—Brunson & Boatwright v. Atlantic Coast Line R. Co., 76 S. C. 9, 56 S. E. 538.

R. I.—Vaughn v. New York, etc., R. Co., 27 R. I. 235, 61 Atl. 695, where a carrier permits the consignee of merchandise to open the cars containing the same after they have been placed on a spur track near the consignee's warehouse, and to remove part of the contents thereof, and exercise and retain dominion over the

rier as an insurer is broken by non-delivery, and the question of negligence in the performance of its duty to deliver safely is, therefore, immaterial.² The carrier's liability as a common carrier terminates in respect to particular goods when its liability as warehouseman commences.³ When goods are safely conveyed to the place of destination and it is impossible for the carrier to deliver the goods because the consignee is dead, absent, or neglects or refuses⁴ to receive the goods, or is not known, or cannot after reasonable diligence be found, the carrier may be discharged from further responsibility as a carrier by storing the goods in its freight depot, or placing them in a proper warehouse for or on account of the owner, if it has made all reasonable effort to effect

same, and put his own locks on the cars, the carrier's liability, as such, for the merchandise in the cars, is terminated.

S. C.—*Deschamps v. Atlantic Coast Line R. Co.*, 82 S. C. 236, 64 S. E. 144; *Murphy v. Southern Ry. Co.*, 77 S. C. 76, 57 S. E. 664.

U. S.—*The Titania*, 124 Fed. 975, after the delivering of goods on a wharf, notice to the consignee, and a reasonable time thereafter for the consignee to take the goods away, the carrier is not under the strict liability of a carrier, but is charged with liability as a warehouseman or bailee, and with the duty of exercising reasonable care and attention to prevent loss or damage to the goods.

Moffat v. Great Western, etc., R. Co., 15 L. T. N. S. 630; *Fowler v. Great Western, etc., R. Co.*, 22 L. J. Exch. 76, 7 Exch. 699; *Bodenham v. Bennett*, 4 Price, 31; *Duff v. Budd*, 3 B. & D. 177; *Richards v. London, etc., R. Co.*, 18 L. J. C. P. 251, 7 C. B. 839.

A subsequent acquiescence by the consignee in a wrong delivery exempts the carrier from liability therefor. *O'Dougherty v. Boston, etc., R. Co.*,

1 Sup. Ct. (N. Y.) 477. There is no liability on the part of a railroad company as a common carrier for carloads of grain delivered by it in pursuance of a contract, and standing on spur tracks on the premises of an elevator company, laid to store grain until it could be unloaded in the elevator, notwithstanding it had the further duty of switching such cars into the elevator when demanded by those in charge, and switching the empty cars away, as such liability terminates on delivering the cars on such tracks. *Paddock v. Toledo, etc., Ry. Co.*, 11 O. C. D. 789, 21 Ohio Cir. Ct. R. 626.

2. *Hall v. Boston, etc., R. Co.*, 12 Allen (Mass.), 439; *Forbes v. Boston, etc., R. Co.*, 133 Mass. 154, 9 Am. & Eng. R. Cas. 76; *Richards v. London, etc., R. Co.*, 18 L. J. C. P. 251, 7 C. B. 839.

3. See *Carrier's liability as warehouseman*, chap. 9.

4. *Levy v. Weir*, 38 Misc. Rep. (N. Y.) 361, 77 N. Y. Supp. 917; *Byrne v. Fargo*, 36 Misc. Rep. (N. Y.) 543, 73 N. Y. Supp. 943. See *Delivery where consignee refuses to receive*, § 31. *post*.

a delivery and has done all that could reasonably be required of it. If the carrier under such circumstances store the goods in its own warehouse, after keeping them for a reasonable time, if the consignee does not call for them, its liability as a common carrier ceases and from that time it becomes liable only as a warehouseman.⁵ In some instances it has been held that notice to the consignor is necessary, upon the refusal of the consignee to receive the goods, in order to relieve the carrier of its responsibility as a carrier.⁶ The degree of care which it is the duty of the carrier to use in delivering the goods entrusted to it depends upon and varies with the nature and condition of the goods and the circumstances under which the delivery takes place. What is proper and reasonable diligence to effect a delivery, and what constitutes a delivery cannot be regulated or prescribed by any fixed standard but must depend upon the varying circumstances of each case.⁷ In the case of carriers by sea or on inland waters, a delivery on the usual wharf is such a delivery as will discharge

5. *N. Y.*—Fenner v. Buffalo, etc., R. Co., 44 N. Y. 505; Powell v. Myers, 26 Wend. (N. Y.) 591; Fisk v. Newton, 1 Den. (N. Y.) 45, 43 Am. Dec. 649; Jones v. Norwich, etc., Transp. Co., 50 Barb. (N. Y.) 193, crit'd, 49 N. Y. 303; Roth v. Buffalo, etc., R. Co., 34 N. Y. 548, 90 Am. Dec. 736; Northrop v. Syracuse, etc., R. Co., 2 Trans. App. (N. Y.) 183, 3 Abb. Dec. (N. Y.) 386; Mayell v. Potter, 2 Johns. Cas. (N. Y.) 371; Clendaniel v. Tuckerman, 17 Barb. (N. Y.) 184.

Ala.—Kennedy v. Mobile, etc., R. Co., 74 Ala. 430, 21 Am. & Eng. R. Cas. 145; Alabama, etc., R. Co. v. Kidd, 35 Ala. 209.

Conn.—Hurd v. Hartford, etc., S. Co., 40 Conn. 49.

Ill.—Illinois Cent. R. Co. v. Friend, 64 Ill. 303; Bartholomew v. St. Louis, etc., R. Co., 53 Ill. 227, 5 Am. Rep. 45.

Ind.—Adams Express Co. v. Darnell, 31 Ind. 20, 99 Am. Dec. 582.

Ohio.—Hirsch v. Steamboat Quaker City, 2 Disney (Ohio), 144.

Pa.—Cope v. Cordova, 1 Rawle (Pa.), 203.

Tenn.—Rankin v. Memphis, etc., Packet Co., 9 Heisk. (Tenn.) 564, 24 Am. Rep. 339; Dean v. Vaccaro, 2 Head (Tenn.) 490, 75 Am. Dec. 744; Southern Express Co. v. Kaufman, 12 Heisk. (Tenn.) 161.

Wis.—Marshall v. American Express Co., 7 Wis. 1, 73 Am. Dec. 381.

Eng.—White v. Humphrey, 11 Q. B. 43, 63 E. C. L. 43; Cairus v. Robins, 8 M. & W. 258; Heugh v. London, etc., R. Co., L. R. 5 Exch. 51, 39 L. J. Exch. 48; Stephenson v. Hart, 4 Bing. 476, 15 E. C. L. 47; Garside v. Trent Nav. Co., 4 T. R. 581.

6. See Notice to consignor, § 12, chap. 9.

7. Westchester, etc., R. Co. v. McElwee, 67 Pa. St. 211; Gill v. Manchester, etc., R. Co., 42 L. J. Q. B. 89, L. R. 8 Q. B. 186; Redman's Law

the carrier when due and reasonable notice thereof has been given to the consignee; but the carrier cannot leave or abandon the goods upon the wharf, in an unprotected state, even though there be an inability or refusal of the consignee to receive them.⁸ As between the carrier and the vendor of the goods, so long as the goods remain in the possession of the carrier the right of stoppage in transitu exists in favor of the vendor;⁹ but when the goods have come under the actual control of the vendee, the right of stoppage ceases;¹⁰ so that an actual change of possession from the carrier to the consignee must have taken place in order to constitute such a delivery as would bar the vendor's right of stoppage. A carrier, agreeing with consignees to deliver cotton to a compress company, must, in the absence of any contract to the contrary, make delivery in the usual manner, and place the cotton in an accessible position, and give notice thereof to the company; and until this is done, and reasonable time to unload has elapsed, the liability is that of a carrier.¹¹ Where a transfer company transporting goods consigned to the owner in care of a warehouseman, was given a receipt for the goods in good condition by the warehouseman, and they were found damaged on the sidewalk in front of the warehouse, the warehouseman, and not the transfer company, is liable for the damage.¹² Where the carrier and shipper contract that the carrier's liability as such shall terminate after 48 hours' notice to the consignee, and the

Ry. Carr. (2d Ed.), p. 103; *Cope v. Cordova*, 1 Rawle (Pa.), 203.

8. *McAndrew v. Whitlock*, 52 N. Y. 40, 11 Am. Rep. 657; *Rowland v. Miln*, 2 Hilt. (N. Y.) 150; *Gulliver v. Adams Express Co.*, 38 Ill. 502; *Bartholomew v. St. Louis, etc., R. Co.*, 53 Ill. 237; *Chicago, etc., R. Co. v. Fairclough*, 51 Ill. 106. See also, *Mote v. Chicago, etc., R. Co.*, 27 Iowa 22; *Mattison v. New York, etc., R. Co.*, 57 N. Y. 552; *Chickering v. Fowler*, 4 Pick. (Mass.) 371.

It has been held that the responsibility of a common carrier on the Ohio River does not cease by the delivery of the goods on the wharf and

notice given to the consignee, but that the duty of the carrier is to attend to the actual delivery. *Hemp-hill v. Chenie*, 6 W. & S. (Pa.) 62. And see *Blin v. Mayo*, 10 Vt. 56; *Galloway v. Hughes*, 1 Bailey (S. C.) 553.

9. *Harris v. Pratt*, 17 N. Y. 249; *Farrell v. Richmond, etc., R. Co.*, 102 N. C. 390, 37 Am. & Eng. R. Cas. 704, 11 Am. St. Rep. 760.

10. *Becker v. Hallgarten*, 86 N. Y. 167.

11. *Yazoo & M. V. R. Co. v. Blum*, — Miss. —, 59 So. 92.

12. *Neville v. Woolverton*, 142 N. Y. Supp. 292.

provisions of the contract are not in conflict with the law, they will govern the relations of the parties, even though they impose a greater burden than the statute upon the carrier.¹³ A carrier's liability for injuries to goods cannot survive a delivery and acceptance prior to the damage.¹⁴ The relation of carrier and shipper had ceased, though the shipper left goods in the car, by permission, under agreement to pay demurrage.¹⁵ Where the consignee's agent had surrendered the bill of lading, gone to the car which had been spotted on the delivery tracks for delivery, and had broken the seal and entered the car before a fire occurred, there was a delivery and the carrier was not liable.¹⁶ The liability of a common carrier continues until notice of the arrival of goods at their destination is given and a reasonable time allowed to remove them, which notice must be in writing, and may be delivered personally, left at the place of business of the consignee, or deposited in the post office.¹⁷ In an action for loss of goods by fire after arrival at destination, it is proper to refuse to instruct that payment of freight alone terminated the contract of carriage.¹⁸ The reasonable time after notice that must be allowed by a railroad company for a consignee to remove its goods from its depot applies to every one alike, regardless of the consignee's distance from the depot.¹⁹ A consignee should have a reasonable time to remove goods after they have been placed in a carrier's warehouse at their destination.²⁰ A carrier is not

13. *St. Louis, etc., Ry. Co. v. Hicks* (Tex. Civ. App.), 158 S. W. 192.

14. *Barclay v. Southern Ry. Co.*, — Ala. App. —, 60 So. 479.

15. *Texas & P. R. Co. v. Robertson* (Tex. Civ. App.), 143 S. W. 708.

16. *Rothchild Bros. v. Northern Pac. Ry. Co.*, 68 Wash. 527, 123 Pac. 1011.

Where the shipper of a car load of household goods took charge of them when they were switched onto a siding at a station which had no depot or agent, and commenced unloading them, locking the car for the night to finish the next day, there was a complete delivery of the car to him,

so that the carrier was not liable for damage to the goods from rain the night after he began unloading. *Southern Ry. Co. v. Barclay*, 1 Ala. App. 348, 56 So. 26.

17. *Citizens' & Marine Bank of Newport News v. Southern Ry. Co.*, 153 N. C. 346, 69 S. E. 261.

18. *Eli Hurley & Son v. Norfolk & W. Ry. Co.*, 68 W. Va. 471, 69 S. E. 904.

19. *Gulf, etc., Ry. Co. v. Ferguson-McKinney Dry Goods Co.*, 97 Miss. 266, 52 So. 797.

20. *Lewis v. Louisville & N. R. Co.*, 135 Ky. 361, 122 S. W. 184.

liable for damage to oats by fermentation while the cars are at the point of destination, awaiting delivery to the consignee who has received proper notice of their arrival.²¹ A carrier's liability as such continues until such time as the consignee has had a reasonable time to inspect the goods and take them away after notice of arrival in the usual course of business.²² Where a common carrier has transported goods to destination, and the consignee has paid the freight and given his receipt for the shipment, the contract of carriage is complete; and if, having received a portion of the goods, he leaves the remainder in the depot overnight, through the courtesy of the carrier, and it is burned, the carrier, if liable, is responsible only for gross negligence.²³ Where freight does not arrive at its destination on time, for this reason, as well as because the bill of lading provides for notice, notice of its being ready for delivery is necessary to relieve the carrier of liability for its destruction by fire, though there has been a reasonable time for its removal after it was ready therefor.²⁴ Where the consignee is present on the arrival of goods, he is required to receive them without unreasonable delay, or the carrier's liability as such is terminated. If the consignee is absent, but lives in the immediate vicinity of the place of delivery, the carrier must notify him of the arrival of the goods, after which he has a reasonable time to remove them; but if he is absent, unknown, or cannot be found, the carrier may place the goods in a warehouse, and after keeping them a reasonable time, if not delivered, the carrier's liability as such ceases.²⁵ Where a bill of lading provided that property not removed within 24 hours after arrival at destination may be kept in the car, depot, or place of delivery of the carrier at the owner's risk, or may at the carrier's option be stored at the owner's risk and cost, subject to the carrier's lien, such clause was only applicable to property after it reached its destination and did not apply to hay transported

21. *Hardin v. Chicago & A. Ry. Co.*, 134 Mo. App. 681, 114 S. W. 1117.

22. *North Yakima Brewing & Malting Co. v. Northern Pac. Ry. Co.*, 49 Wash. 375, 95 Pac. 486.

23. *Stewart v. Central of Ga. Ry. Co.*, 3 Ga. App. 397, 60 S. E. 1.

24. *Scott County Milling Co. v. St. Louis, etc., R. Co.*, 127 Mo. App. 80, 104 S. W. 924.

25. *McGregor v. Oregon R. Co.*, 50 Or. 527, 93 Pac. 465.

under a contract requiring delivery at ship's side within lighterage limits of the port of New York, which had only reached the rail terminal at the time it was stored and destroyed.²⁶ The liability of a carrier of a carload of freight continues until the discharge of the freight from the car.²⁷ Even though a consignee had a right to inspect cars of freight placed on its switch before accepting them, a delivery on the switch subject to the right of inspection released the carrier from liability as a common carrier, unless the consignee on inspection rejected the freight, and notified the carrier thereof.²⁸

§ 2. Unloading and storing goods.

In some jurisdictions the rule prevails that the unloading of the goods by the carrier and their safe deposit in a place usually convenient for being taken away by the consignee, such as the platform or warehouse of the company, or a storehouse from which the consignee may obtain them upon demand, although the carrier does not notify the consignee of the arrival of the goods, constitutes a delivery and the carrier's liability as an insurer ceases, in the absence of any special circumstances or agreement effecting the case.²⁹ In other jurisdictions the rule is that the carrier's lia-

26. *Bolles v. Lehigh Valley R. Co.*, 159 Fed. 694, 86 C. C. A. 562.

27. *Yount v. Wabash R. Co.*, 136 Mo. App. 697, 119 S. W. 1.

28. *Kingman St. Louis Implement Co. v. Southern Ry. Co.*, 133 Mo. App. 317, 112 S. W. 721.

Where, after delivery of cars of freight to a consignee, the carrier agreed to take them to higher ground to protect them from flood without any charge for switching or otherwise, except the actual expense of handling the cars to keep them out of the water, the carrier took the cars as a bailee, and not as a carrier. *Id.*

29. *Thomas v. Boston, etc., R. Corp.*, 10 Metc. (Mass.) 477, 43 Am. Dec. 444; *Rice v. Hart*, 118 Mass.

201, 19 Am. Rep. 433. This rule is maintained in Massachusetts, Georgia, Illinois, Indiana, Iowa, Missouri, Pennsylvania North Carolina, and Tennessee. See Carrier's liability as warehouseman as to goods awaiting delivery, § 3, chap. 9.

Payment of freight charges by the consignee after notice of arrival, without any arrangement as to the further custody of the goods by the company, amounts to a delivery so far as to throw the risk of loss upon the consignee. *New Albany, etc., R. Co. v. Campbell*, 12 Ind. 55; *Chalk v. Charlotte, etc., R. Co.*, 85 N. C. 423, 9 Am. & Eng. R. Cas. 106. See also, *Baldwin v. American Express Co.*, 23 Ill. 197, 74 Am. Dec. 190, as to what constitutes a delivery where con-

bility as insurer continues after the arrival of the goods at their destination and their deposit there in a warehouse, until the lapse of a reasonable time for the removal of the goods by the consignee, after notice of their arrival. But when such reasonable time has elapsed, a constructive delivery is effected and the company becomes liable as warehouseman merely.³⁰ Where it is expressly provided in the contract of shipment, or the consignee accepts such delivery, a complete delivery may be effected before the goods are unloaded.³¹ A delivery of part of a consignment of goods ordinarily establishes a presumptive delivery of the entire consignment,³² but where the evidence is conflicting the question whether the delivery of a part was intended for a delivery of the whole, or only of the part taken, is properly one for the jury.³³ What constitutes a sufficient delivery by a carrier is ordinarily a question

signee was absent, and the goods were stored.

A carrier transporting freight on platform cars to a station where it maintains a freight house, but no agent, is held, in *Normile v. Northern P. R. Co.*, 36 Wash. 21, 77 Pac. 1087, 67 L. R. A. 271, to be obliged to place the freight in the freight house in order to relieve itself from liability for freight lost through theft, unless it shows that it is not able to do so.

30. *Pennsylvania R. Co. v. Naive*, (Tenn.) 79 S. W. 124; *Herf & Frericks Chemical Co. v. Lackawanna Line*, (Mo. App.) 73 S. W. 346; *King v. New Brunswick, etc., Steamboat Co.*, 36 Misc. Rep. (N. Y.) 555, 73 N. Y. Supp. 999; *Missouri Pac. R. Co. v. in New Hampshire, New York and many of the other states and is the English rule. See Carrier's liability as warehouseman as to goods awaiting delivery*, § 4, chap. 9.

R. Cas. 645; *Bradshaw v. Irish North Western R. Co.*, 7 Ir. R. C. L. 252, 3 Ry. & Ct. Cas. XI. This rule is held *Haynes*, 72 Tex. 175, 37 Am. & Eng.

31. *Whitney Mfg. Co. v. Richmond, etc., R. Co.*, 38 S. C. 365, 37 Am. St. Rep. 767, 55 Am. & Eng. R. Cas. 611; *Armistead Lumber Co. v. Louisville, etc., R. Co.*, (Miss.) 11 So. 472, 55 Am. & Eng. R. Cas. 600. Compare *Pindell v. St. Louis, etc., R. Co.*, 34 Mo. App. 675.

32. *Stapleton v. Grand Trunk Ry. Co.*, (Mich.) 94 N. W. 739, 10 Det. Leg. N. 133; *Tallahassee Falls Mfg. Co. v. Western Ry. of Alabama*, (Ala.) 29 So. 203; *Whitney Mfg. Co. v. Richmond, etc., R. Co.*, *supra*; *Culbreth v. Philadelphia, etc., R. Co.*, 3 Houst. (Del.) 392. Compare *Cox v. Peterson*, 30 Ala. 608, 68 Am. Dec. 145, where the acceptance of a portion of the goods by the consignee at a different place from that specified in the contract, though held admissible in mitigation of damages, was held not to discharge the carrier from liability as to the remainder.

33. *Sessions v. Western R. Corp.*, 16 Gray (Mass.) 132; *Cook v. Erie R. Co.*, 58 Barb. (N. Y.) 312.

of fact to be determined by the jury, but when there is no conflict in the testimony it may be settled by the court.³⁴

§ 3. Liability for injury while goods are being unloaded.

Ordinarily it is the carrier's duty to unload goods with due care at the termination of their transit, and it is responsible for injuries to the goods while being unloaded.³⁵ In unloading and delivering goods transported by it, the carrier is liable in all cases for the want of ordinary care on the part of its servants.³⁶ But if the delivery has been completed by the acceptance by the owner or consignee of the goods before they are unloaded and the owner or consignee voluntarily undertakes to unload them or has previously agreed to unload them, the owner or consignee of the goods becomes responsible for any loss or injury incurred during the

34. *Alabama G. S. R. Co. v. Eichoffer*, 100 Ala. 224 *Whitney Mfg. Co. v. Richmond, etc., R. Co.*, *supra*.

35. *Russell v. Livingston*, 19 Barb. (N. Y.) 346; *Chicago, etc., R. Co. v. Bensley*, 69 Ill. 630; *Porter v. Railroad*, 20 Ill. 407; *Alabama, etc., R. Co. v. Kidd*, 35 Ala. 209.

Where it was the duty of the defendant to transfer a load to a steamer from a lighter and the negligent manner of unloading was the cause of the lighter's listing and a portion of the goods being lost, the defendant was liable for the damage. *McAllister v. Southern Pac. Co.*, (U. S. D. C. N. Y.) 111 Fed. 938.

36. *DeMott v. Laraway*, 14 Wend. (N. Y.) 225, 28 Am. Dec. 523, where a hogshead of molasses is allowed to fall while it is being unloaded from the vessel to the wharf, and its contents thereby lost, it is no defense that the hoisting tackle belongs to some third person, since the tackle must be regarded as the carrier's *pro hac vice*.

The rule stated in the text is true, although the consignee, knowing it to

be the rule of the company that he must unload, and that if he failed to do so within a certain time the company would, has neglected to unload, *Kimball v. Western R. Corp.*, 6 Gray (Mass.) 542.

"The precise degree of care which it is the duty of the carrier to use in delivering the goods intrusted to him must depend upon and vary with the nature and condition of the thing carried, and the ever varying circumstances under which the delivery takes place. Some goods require much more tender handling than others; some animals much more care and management than others, according to their nature, habits, and conditions; and the line of conduct which the carrier should propose to himself is that which a prudent owner would adopt if he were in the carrier's place under the circumstances and subject to the conditions in which the carrier is placed and under which he is called on to act." *Gill v. Manchester, etc., R. Co.*, 42 L. J. Q. B. 89, L. R. 8 Q. B. 186.

work of unloading, even though he has the assistance of the carrier's servants.³⁷ But where by the provisions of a bill of lading merchandise is to be delivered "from the ship's tackle where the ship's responsibility shall cease," her liability, after the goods are discharged, is that of a bailee, charged with the duty to take ordinary care of the property for a reasonable length of time, and not to abandon it, or negligently expose it to injury.³⁸ An owner or consignee accepting freight in a car and undertaking to unload it is responsible for any injury incurred during the progress of the unloading.³⁹

§ 4. Delivery must be made to the consignee or his agent.

No obligation of the carrier is more rigorously enforced than that which requires delivery to the proper person, and the law allows of no excuse to a common carrier for a wrong delivery of goods entrusted to him for transportation, except the fault of the

37. *Lewis v. Western R. Corp.*, 11 Metc. (Mass.) 509.

A consignee, or his authorized agent, may receive goods addressed to him in the hands of a carrier at any place either before or after their arrival at their place of destination, and such acceptance operates as a discharge of the carrier from his liability to the consignor. *Sweet v. Barney*, 23 N. Y. 337.

Where the owner furnished skids for unloading a hogshead of molasses from the carrier's wagon, and, through a latent defect in the skids, the hogshead fell to the ground and its contents were lost, the carrier was not liable. *Loveland v. Burke*, 120 Mass. 139, 21 Am. Rep. 507.

38. *Smith v. Britain S. S. Co.*, (U. S. D. C. N. Y.), 123 Fed. 176; *Chel-sea Jute Mills v. Britain S. S. Co.*, 123 Fed. 176, where the owners of a consignment of jute were notified of the arrival of the ship and the time of discharging, but did not remove a

part of the goods because it was more convenient to load it upon lighters after the ship had left her berth, the ship was held not liable for an injury by rain to the jute which she was compelled to unload on an uncovered part of the wharf because the shed under which most of it was placed had been filled, and where she covered it and took all reasonable care to protect it from injury.

Unloading goods during a storm on an open platform, and leaving them unprotected from the weather is not a fault of the carrier, where there is no building at that station or any agent of the carrier, and the bill of lading provides that when delivered on the platform they are at the risk of the owner. *Allam v. Pennsylvania R. Co.*, 183 Pa. 174, 41 W. N. C. 205, 38 Atl. 709, 39 L. R. A. 535.

39. *Beaumont v. Philadelphia & R. Ry. Co.*, 38 Pa. Super. Ct. 224.

shipper himself. Unless there are special circumstances which permit a delivery to be made otherwise, the delivery must be made to the consignee of the goods, or to his duly authorized agent, and the carrier is responsible if the goods are delivered to any other party.⁴⁰ The carrier is liable in an action for conversion.⁴¹ The consignee is the presumptive owner of the thing consigned, and a carrier, without notice to the contrary, must regard the consignee of the goods as the absolute owner, and a legal delivery to him will discharge the carrier from all liability to the consignor.⁴² A delivery to the consignee's agent, who has been duly authorized to receive the goods for his principal, is a good delivery,⁴³ or a

40. *Furman v. Union Pac. R. Co.*, 106 N. Y. 579, 13 N. E. 587; *Viner v. New York, etc., Steamship Co.*, 50 N. Y. 25. Where a carrier delivered certain merchandise directed to M. at a certain casino to a barkeeper at the casino, who was not M.'s agent, or authorized by her to receive the package, there was no delivery to the consignee, and the carrier was therefore liable. *Charles Schlesinger & Sons v. New York, etc., R. Co.*, 85 N. Y. Supp. 372.

The carrier is entitled to pay to the consignee the value of goods lost while in its charge and for which it is responsible; and the fact that the consignee owned the article by virtue of a conditional sale duly registered will not render it liable to the vendor for the amount still due him by the consignee. *Dyer v. Great Northern R. Co.*, 51 Minn. 345.

41. *Security Trust Co. v. Wells, Fargo & Co. Express*, 81 App. Div. (N. Y.) 426, 80 N. Y. Supp. 830; *Missouri, etc., R. Co. v. Seley*, 31 Tex. Civ. App. 158, 72 S. W. 89; *Cleveland, etc., Ry. Co. v. Wright*, 25 Ind. App. 525, 58 N. E. 559.

A demand of the delivery of goods by a mortgagee, by virtue of a chat-

tel mortgage after conditions broken, but without legal process, will not make the carrier liable for conversion if it refuses to surrender them, where the goods were received from a third person who has a bill of lading therefor. *Kohn v. Richmond, etc., R. Co.*, 37 S. C. 1, 34 Am. St. Rep. 726, 16 S. E. 376, 47 Alb. L. J. 71.

42. *O'Dougherty v. Boston, etc., R. Co.*, 1 Thomp. & C. (N. Y.) 477; *Tibbs v. Cleveland, etc., R. Co.*, 20 Ind. App. 192, 50 N. E. 486; *Bingham v. Lamping*, 26 Pa. St. 340, 67 Am. Dec. 418; *St. Louis, etc., R. Co. v. Crawford*, (Tex. Civ. App.) 35 S. W. 748.

Where goods were consigned to K., care of "B's Express," it was proper for the carrier to deliver the goods to K. without production of the bill of lading, since by the consignment and delivery of the goods to the carrier, to be conveyed to the consignee, the property in the goods became vested in the consignee. *Schlesinger v. West Shore R. Co.*, 88 Ill. App. 273.

43. *Ontario Bank v. New Jersey Steamboat Co.*, 59 N. Y. 510; *Platt v. Wells*, 26 How. Pr. (N. Y.) 442, 2 Robt. (N. Y.) 101; *Illinois Cent.*

delivery to a third party under instructions from such agent.⁴⁴ A delivery of a money package addressed to a bank or to the cashier of a bank has been held good when delivered to a receiving teller or other employe of the bank acting at the time in the discharge of his duties and authorized and accustomed to receive money packages for the bank.⁴⁵ So, of a delivery of such a package to a wharfinger, in accordance with a uniform usage to deliver such packages of money shown to have been well known to the plaintiff.⁴⁶ The delivery of a wife's goods to a husband may be made under such circumstances that the carrier will have the right to presume and act upon the presumption that the husband is the duly authorized agent of the wife.⁴⁷ It devolves upon the carrier, in an action for misdelivery, to prove the agent's authority to receive the goods, where it defends on the ground that it delivered the goods to the consignee's agent, or to show that the person to whom the goods were delivered had such apparent authority as to justify the carrier in presuming that such person had authority to receive the goods.⁴⁸ Where the consignor is

R. Co. v. Simpson, 17 Ill. App. 325; Lewis v. Western R. Corp., 11 Metc. (Mass.) 509; Southern Express Co. v. Everett, 37 Ga. 688.

44. Gates v. Chicago, etc., R. Co., 42 Neb. 379.

Delivery to a cartman, drayman, or other person not authorized by the consignee to receive the goods is at the carrier's risk. Dean v. Vaccaro, 2 Head. (Tenn.) 488, 75 Am. Dec. 744.

45. Sweet v. Barney, 23 N. Y. 335; Hotchkiss v. Artisans' Bank, 2 Abb. App. Dec. (N. Y.) 403, aff'g 42 Barb. (N. Y.) 517.

46. Bank v. Champlain Transp. Co., 16 Vt. 52, 42 Am. Dec. 491.

47. Reynolds v. New York Cent., etc., R. Co., 3 N. Y. Supp. 331, 21 St. Rep. (N. Y.) 319; Furman v. Chicago, etc., R. Co., 57 Iowa, 42, 23 Am. & Eng. R. Cas, 731, 62 Iowa 395.

48. Williams v. Holland 22 How.

Pr. (N. Y.) 137; Nebenzahl v. Fargo, 15 Daly (N. Y.), 130, where delivery to one claiming to be a clerk, but whose authority was denied by the consignee, was held to be unauthorized; Angle v. Mississippi, etc., R. Co., 9 Iowa 487, 18 Iowa 555, where a new firm was held not to have authority to receive under an authorization given to the old firm; Adams v. Blankenstein, 2 Cal. 413, 56 Am. Dec. 350; Hermann v. Goodrich, 21 Wis. 536, 94 Am. Dec. 562; Waldron v. Chicago, etc., R. Co., 1 Dakota, 336; The Steamboat Sultana v. Chapman, 5 Wis. 454.

No greater proof of authority is required than for any other issue in a civil action. Wilcox v. Chicago, etc., R. Co., 24 Minn. 269.

The delivery of goods on a forged order purporting to come from the consignee, although the order was presented by a person who had for-

known to the carrier to be the owner, the carrier must be understood to contract with him only, for his interest, upon such terms as he dictates in regard to the delivery, and the consignee is to be regarded simply as an agent selected by him to receive the goods at the place indicated. A delivery by the carrier in such case, without the knowledge of the shipper, to a third person, at the place of shipment, on the order of the consignee, will render the carrier liable to the shipper.⁴⁹ Where the consignor has expressly directed a delivery to a third person, or to the consignee only upon his performing certain prescribed conditions, the delivery must be in accordance with such instructions;⁵⁰ and a delivery in accordance with the consignor's orders relieves the carrier from further liability.⁵¹ A carrier who, without authority from the consignor or consignee, delivers to the consignor's general agent at the place of delivery a package directed to the consignee, is liable therefor to the consignee.⁵² And where the consignee of goods did not reside at the point where they were to be delivered and did not expect to be there to receive them, the carrier was held not to be

merely been the consignee's clerk, does not relieve the carrier from liability. *American Merchants' Union Exp. Co. v. Milk*, 73 Ill. 224.

49. *Southern Express Co. v. Dickson*, 94 U. S. 549; *Louisville, etc., R. Co. v. Hartwell*, 99 Ky. 436, 36 S. W. 183, 18 Ky. L. Rep. 745, 4 Am. & Eng. R. Cas. N. S. 550, 38 S. W. 1041.

And where the local agent of the consignor, to whom the goods were consigned has directed the carrier to deliver them only upon his order, a delivery by the carrier to a third person was without authority. *Wolfe v. Missouri Pac. R. Co.*, 97 Mo. 473, 10 Am. St. Rep. 331, 37 Am. & Eng. R. Cas. 715.

An agent of the consignor has no implied authority to direct the carrier as to whom goods shall be delivered to, and a mere statement by him that the goods are intended for

certain parties without further directions from the shippers will not justify a delivery to such parties. *Sawyer v. Chicago, etc., R. Co.*, 22 Wis. 403, 99 Am. Dec. 49.

50. *Foggan v. Lake Shore, etc., R. Co.*, 16 N. Y. Supp. 25, where the shipper directed a delivery to the consignee only upon his producing a bill of lading; *Wright v. Northern Cent. R. Co.*, 8 Phila. (Pa.) 19, where goods were sent to "order of A. B. & Co., notifying C," the carrier was held liable for a wrongful delivery to C. without an order from A. B. & Co. See also *Delivery to holder of bill of lading*, § 9, *post*.

51. *Ruffin v. Ruggiero*, 10 Misc. Rep. (N. Y.) 39; *Brasher v. Denver, etc., R. Co.*, 12 Colo. 384.

52. *Ela v. American M. U. Express Co.*, 29 Wis. 611, 9 Am. Rep. 619.

justified in delivering them to the resident agent of the consignee there.⁵³

§ 5. Delivery may always be made to the true owner of the goods.

When the real owner of goods in the hands of a carrier comes and demands his property he is entitled to its immediate delivery, and it is the duty of the carrier to make it. The law will not adjudge the performance of this duty tortious as against a consignor or consignee having no title.⁵⁴ The carrier has the right to interpose, in all cases, as a defense to an action brought by the bailor subsequently for the property, the right of the third person to whom it, as bailee, has yielded by delivering the property.⁵⁵ Where the carrier surrenders possession of the goods to the person whom it ascertains, in the course of the transportation or before final delivery, to be the real owner, it is discharged from further liability.⁵⁶ But to justify a delivery to the true owner contrary to or without the orders of the consignor, the carrier assumes the burden of proving the ownership at the time of such delivery and the immediate right of possession to have been in the person to

53. *Wilson Sewing Machine Co. v. Louisville, etc., R. Co.*, 71 Mo. 203.

54. *Western Transp. Co. v. Barber*, 56 N. Y. 544; *Mullins v. Chickering*, 110 N. Y. 514; *The Idaho*, 93 U. S. 575, 23 L. Ed. 978, 11 Blatchf. (U. S.) 218; *Wells v. American Express Co.*, 55 Wis. 23, 42 Am. Rep. 695, 6 Am. & Eng. R. Cas. 300.

The true owner of the property in the possession of a common carrier may have the same diverted at a station on the route between the shipping point and the place of destination while it is in transit, but may be required to produce the bill of lading or furnish other evidence of ownership to entitle him to this right. *Ryan v. Great Northern Ry. Co.*, (Minn.) 95 N. W. 758.

55. *Lake Shore, etc., R. Co. v.*

National Live-Stock Bank, 178 Ill. 506, 13 Am. & Eng. R. Cas. N. S. 1, revg. 59 Ill. App. 451, 53 N. E. 326; *Western Transp. Co. v. Barber*, *supra*; *Shellenberg v. Fremont, etc., R. Co.*, 45 Neb. 487; *Harker v. Dement*, 9 Gill (Md.) 7, 52 Am. Dec. 670; *Biddle v. Bond*, 6 B. & S. 224; *White v. Bartlett*, 9 Bing. 382; *Cheesman v. Exall*, 6 Exch. 341; *Dixon v. Yates*, 27 Eng. C. L. 92.

56. *Bates v. Stanton*, 1 Duer (N. Y.) 79; *Rosenfeld v. Express Co.*, 1 Woods (U. S.) 131; *King v. Richards*, 6 Whart. (Pa.) 418, 37 Am. Dec. 420; *Floyd v. Bovard*, 6 W. & S. (Pa.) 75; *Hardman v. Willecock*, 9 Bing. 382, note. Compare *Kohn v. Richmond, etc., R. Co.*, 37 S. C. 1, 34 Am. St. Rep. 726; *Story Bailm.* (9th Ed.) § 582.

whom such delivery was made.⁵⁷ The general rule that the agent must account to his principal and cannot set up the *jus tertii*, nor in any way dispute his title, applies to the common carrier, and the carrier must deliver according to the shipper's orders or the terms of the bill of lading, unless the true owner, whose rights are paramount to the claims of all others, has enforced his right to the possession and the carrier has yielded to it.⁵⁸ The fact that the true owner of the goods is a stranger to the contract of bailment does not affect his right to recover them.⁵⁹

§ 6. Delivery to fraudulent purchaser.

If a carrier delivers goods according to their address he is not responsible for the fact that the person to whom they are addressed fraudulently represented himself in writing or orally to the seller to be another person of the same name, or to be a merchant of good financial credit, and bought the goods in the name of such merchant on credit, and that the seller is swindled out of the goods; and the seller cannot maintain an action against the carrier who receives the goods and carries and delivers them to the purchaser.⁶⁰ The

57. *Wolfe v. Missouri Pac. R. Co.*, 97 Mo. 473, 10 Am. St. Rep. 331, 37 Am. & Eng. R. Cas. 719.

58. *Thomas v. Northern Pac. Exp. Co.*, 73 Minn. 85, 75 N. W. 1120, 4 Am. Neg. Rep. 504, 11 Am. & Eng. R. Cas. N. S. 121; *Wells v. American Express Co.*, *supra*; *Western Transp. Co. v. Barber*, *supra*; *Sheridan v. New Quay Co.*, 4 C. B. N. S. 618, 93 E. C. L. 618; *Ogle v. Atkinson*, 5 Taunt. 759; *Browne Carr.* 221; *Hutch. Carr.* § 405.

59. *Shellenberg v. Fremont*, etc. R. Co., *supra*.

60. *Edmunds v. Merchants' Despatch Transp. Co.*, 135 Mass. 283, 16 Am. & Eng. R. Cas. 250; *Samuel v. Cheney*, 135 Mass. 278, 46 Am. Rep. 467; *Dunbar v. Boston*, etc., R. Corp., 110 Mass. 26, 14 Am. Rep. 576; *Barker v. Dinsmore*, 72 Pa. St. 427, 13 Am. Rep. 697; *The Drew*, 15 Fed.

826; *Brasher v. Denver*, etc., R. Co., 12 Colo. 384; *Nanson v. Jacob*, 12 Mo. App. 125, 93 Mo. 331; *Lake Shore, etc., R. Co. v. Luce*, 11 Ohio Cir. Ct. Rep. 543, 1 Ohio Cir. Dec. 145; *Bush v. St. Louis*, etc., R. Co., 3 Mo. App. 62; *McKean v. McIvor*, L. R. 6 Exch. 36; *Hardman v. Booth*, 32 L. J. Exch. 105; *Kingsford v. Merry*, 26 L. J. Exch. 83; *Pacific Exp. Co. v. Hertzberg*, 17 Tex. Civ. App. 100, 42 S. W. 795; *Norwalk Bank v. Adams Express Co.*, 4 Blatchf. (U. S.) 455, Fed. Cas. No. 10,354.

A common carrier is not chargeable with negligence in the delivery of goods, where it delivered them to the man to whom they were sent, and who the carrier was induced, by the acts of the shipper in dealing with him, to believe, was the man to whom the shipper intended to send, though he was insolvent and there was a

fact that the seller was induced to sell by fraud makes the sale voidable but not void, and the carrier is entitled to regard the consignee as the true owner unless actually or constructively notified to the contrary. Delivery to the consignee in such case discharges the carrier, upon the principle that any delivery, valid as to the consignee, is a defense for the carrier as to all persons.⁶¹ But where a common carrier, without requiring evidence of identity, delivers to a stranger goods which have been fraudulently ordered by him in the name of a fictitious firm, and shipped directed to the firm, he is liable to the consignor for their value.⁶² Where by means of a fictitious order, a firm is induced to consign valuable merchandise to a person whom they know to be responsible, the carrier is liable for loss from a delivery of the goods to another person claiming to be the proper consignee, though the delivery is induced by false representations to the carrier's agent.⁶³ And where a carrier, after notice from the consignee that he had not ordered the goods, delivered them to one who had wrongfully ordered them in the name of the consignee, it was liable to the consignor for their value.⁶⁴

reputable merchant of the same name in the town. *Seibert v. Philadelphia, etc., R. Co.*, 15 Pa. Super. Ct. 435.

61. See Delivery must be made to the consignee or his agent, § 4, *ante*.

62. *Price v. Oswego, etc., R. Co.*, 50 N. Y. 213, 10 Am. Rep. 475, 3 Am. Ry. Rep. 325, revg. 58 Barb. (N. Y.) 599; *Winslow v. Vermont, etc., R. Co.*, 42 Vt. 700, 1 Am. Rep. 365; *Sword v. Young*, 89 Tenn. 126; *Weyand v. Atchison, etc., R. Co.*, 75 Iowa 573, 9 Am. St. Rep. 504; *Pacific Express Co. v. Shearer*, 160 Ill. 215, 43 N. E. 816; *Stephenson v. Hart*, 4 Bing. 476, 15 E. C. L. 47; *Wilson v. Adams Express Co.*, 27 Mo. App. 360, 43 Mo. App. 659; *Ryder v. Burlington, etc., R. Co.*, 51 Iowa 460. Compare *Duff v. Budd*, 3 B. & B. 177, 7 E. C. L. 399; *Heugh v. London, etc., R. Co.*, L. R. 5 Exch. 51.

63. *Oskamp v. Southern Express Co.*, (Ohio) 53 N. E. 13.

An express company is not relieved from liability for delivering a package of money to a person other than the consignee by the fact that the consignor might have discovered by the exercise of due care that the order and check for the money were forgeries. *Security Trust Co. v. Wells Fargo and Co. Express*, 81 App. Div. (N. Y.) 426, 80 N. Y. Supp. 830.

64. *Louisville, etc., R. Co. v. Ft. Wayne Electric Co.*, (Ky.) 55 S. W. 918; *Bruhl v. Coleman*, 113 Ga. 1102, 39 S. E. 481.

The omission of the word "order" after the name of the consignee in a bill of lading containing a provision that, in the absence of such word, the carrier might deliver without re-

§ 7. Delivery of goods sent in care of carrier's local agent.

The rule in New York and some other jurisdictions, where goods are delivered to a carrier directed to a consignee in care of the carrier's local agent at the termination of the route along which the carrier is to transport the package, is that a delivery to the carrier's agent does not relieve the carrier from liability in case of loss, since such agent does not receive the package as agent of the consignee.⁶⁵ In other jurisdictions it is held that a delivery to such agent terminates the carrier's responsibility and the agent holds the goods as the agent of either the consignor or the consignee, whoever may be the owner of the goods.⁶⁶

quiring the production of the bill of lading, did not exempt the carrier from liability for a misdelivery of the goods to a complete stranger. *Marrus v. New Haven Steamboat Co.*, 30 Misc. Rep. (N. Y.) 421, 62 N. Y. Supp. 474.

65. *Russell v. Livingston*, 16 N. Y. 516, 518, revg. 19 Barb. (N. Y.) 346, wherein the court said: "Ordinarily the address of a package to the care of any one is an authority to the carrier to deliver it to such person; but when the person to whom it is thus addressed is the agent and principal representative of the carrier himself, at the point where the carriage is to terminate, it may be regarded as a mere expansion of the ordinary direction to have it stopped at the place on the route where that agent is in charge of the business. It should be so regarded; for there is no probable reason why a person sending a package should be supposed to choose to terminate the carrier's responsibility and substitute that of the carrier's agent when by such change no new duty would be created, and the package would be dealt with in either case by the same person and in the same way. The only object in giving such a direction

which could be supposed would be to change the responsibility from the carrier to the agent appointed by the carrier; and as such a change would usually impair the security of the owner, as he must be taken generally to know more of the carrier whom he employs than of the carrier's agent, of whom he will commonly know only the name, it would be acting against the natural presumptions which arise from the situation of the parties to attribute to the owner such intention." Compare *Bristol v. Rensselaer, etc., R. Co.*, 9 Barb. (N. Y.) 158, holding that a common carrier is discharged from liability, by a delivery to a person to whose care the goods are directed, though such person be the carrier's agent. And see *Platt v. Wells*, 2 Rob. (N. Y.) 101, 26 How. Pr. (N. Y.) 442.

That the package is addressed to himself or his agent does not lessen the liability and duty to deliver of the carrier who receives the package for delivery, there being no understanding that he shall hold the package for the carrier's convenience. *Bennett v. Northern Pac. Exp. Co.*, 12 Or. 49. See also *United States Express Co. v. Rush*, 24 Ind. 403.

66. *Mobile, etc., R. Co. v. Prewitt*,

§ 8. Consignor's right to change of consignee.

Where a common carrier receives goods for transportation and delivery to the consignee without any qualification or restriction, the consignor parts with the goods and all control over them and the delivery to the carrier is a delivery to the consignee's agent and the consignor cannot, by a subsequent direction to the carrier, prevent their delivery to the consignee, unless such facts are shown as will justify the stoppage of the goods *in transitu*; and where, by subsequent direction of the consignor, the carrier delivers the goods to another person, it is liable for conversion.⁶⁷ But where the delivery to the carrier is qualified, restricted, or conditional, as, for example, where the carrier is notified by the shipper, after delivery to it of the goods, not to deliver them to the consignee until he presents the bill of lading and a draft drawn upon him, the delivery to the carrier is not a delivery to the consignee, and the consignee, on refusal to comply with the condition, acquires no right, or title to the property, and a delivery by the carrier to the consignee under such circumstances renders the carrier liable to the consignor.⁶⁸ The consignor under such circumstances may change the consignee while the goods are in transit,⁶⁹ and has the same right to change their destination, after the goods have passed into the hands of a connecting carrier by taking a new bill of lading.⁷⁰ The carrier also has the right under such circumstances to change the destination of the property before it has been de-

46 Ala. 63, 7 Am. Rep. 586; *Houston, etc., R. Co. v. Hogg*, 2 Tex. Unrep. Cas. 544; *Edwards v. Cheraw, etc., R. Co.*, 32 S. C. 117; *Taylor v. Grand Trunk R. Co.*, 24 U. C. C. P. 582.

67. *Bailey v. Hudson River R. Co.*, 49 N. Y. 70; *Philadelphia, etc., R. Co. v. Wireman*, 88 Pa. St. 264. See also *Wade v. Hamilton*, 30 Ga. 450. Where, having given such subsequent direction, the carrier notwithstanding, delivered the goods to the consignee, and in consequence thereof the consignor sues and obtains a judgment against the carrier in another state for a misdelivery of the goods,

this will not avail in a suit by the carrier against the consignee. *Philadelphia, etc., R. Co. v. Wireman*, 88 Pa. St. 264.

68. *Louisville, etc., R. Co. v. Hartwell*, 99 Ky. 436, 18 Ky. L. Rep. 745, 36 S. W. 183, 4 Am. & Eng. R. Cas. N. S. 550, 38 S. W. 1041; *Cayuga County Nat. Bank v. Daniels*, 47 N. Y. 631; *Bank of Rochester v. Jones*, 4 N. Y. 501, 55 Am. Dec. 290.

69. See cases cited under last preceding note.

70. *Sutherland v. Peoria Second Nat. Bank*, 78 Ky. 250, 6 Am. & Eng. R. Cas. 368.

livered, after a bill of lading has been issued therefor, provided the bill has not been sent to the consignee or some one for him;⁷¹ and even where the first consignee has accepted bills on the strength of the consignment.⁷² Where a bill of lading has been issued by the carrier and forwarded to the consignee, if the carrier issue another it will subject itself to liability on both.⁷³ Where goods are shipped to a factor to sell the same and account to the consignor at a certain price, the goods to remain the property of the consignor until paid for, the consignee is entitled, on presenting the bill of lading, to receive the goods, from the carrier, so long as the contract remains in force, though the consignor notified the carrier not to deliver the goods, and therefore the consignor cannot maintain an action against the carrier for conversion of the goods so delivered to the consignee.⁷⁴ Where a factor has made advances or incurred liability on the strength of a consignment, the consignor has no right by any subsequent order to suspend or control the sale, except as to such surplus as is not necessary for the reimbursement of the advances; so that where the destination of such a consignment was changed to another person, who knew of the factor's claim, the latter was in no better attitude to dispute the factor's right than the consignor himself.⁷⁵ But it has been held, to the contrary, that a debtor who ships goods to his factor and creditor for sale, the proceeds to be applied to the satisfaction of his debt, and sends the bill of lading to such factor, may afterwards change the shipment to another person without making the carrier liable to the first consignee.⁷⁶

71. *Jones v. Earl*, 37 Cal. 630, 99 Am. Dec. 338, and notice to the agent of the carrier, in possession of the goods, of the change binds the carrier; *Blanchard v. Page*, 8 Gray (Mass.) 285; *Strahorn v. Union Stock Yard, etc., Co.*, 43 Ill. 424, 92 Am. Dec. 142; *Thompson v. Trail*, 2 C. & P. 334, 12 E. C. L. 155; *Mitchel v. Ede*, 11 Ad. & El. 888, 39 E. C. L. 260; *Ruck v. Hatfield*, 5 B. & Ald. 632, 7 E. C. L. 260. See Duplicate bills of lading, 19, *post*.

72. *Lewis v. Galena, etc., R. Co.*,

40 Ill. 281. See, also *Delivery to holder of bill of lading*, § 9, *post*.

73. *Hubbersty v. Ward*, 8 Exch. 330. See, *Delivery to holder of bill of lading*, § 9, *post*.

74. *Lester v. Delaware, etc., R. Co.*, 73 Hun (N. Y.) 398, 26 N. Y. Supp 206.

75. *Nelson v. Chicago, etc., R. Co.*, 2 Ill. App. 180.

76. *Chaffe v. Mississippi, etc., R. Co.*, 59 Miss. 182, 9 Am. & Eng. R. Cas. 426. Even where the bill of lading had been made out in the

§ 9. Delivery to holder of the bill of lading.

A bill of lading is the representative or symbol of the property mentioned therein, and its transfer and delivery without indorsement or when properly indorsed and delivered, when indorsement is necessary, operates as a constructive transfer and delivery of the property itself, and the consignor loses the control of the goods by such transfer.⁷⁷ Therefore, when a bill of lading has been issued, it being the duty of the carrier to deliver to the owner of the goods or the person entitled to receive them, delivery must be made to the holder of the bill of lading, and the carrier is liable for a delivery otherwise than in accordance with the bill of lading, or to a person who was not authorized to receive the goods, although he may be the consignee.⁷⁸ A common carrier delivers at its peril goods to the consignee without a bill of lading either made or indorsed to him.⁷⁹ It is the duty of the carrier to ascertain

name of the factor and forwarded to him, and the object was to pay a debt of the consignor to the consignee, it was held that a delivery to the carrier was not a delivery to the consignee, and that the property was liable in the hands of the carrier, to attachment by the consignor's creditors. *Bonner v. Marsh*, 10 Smed. & M. (Miss.) 376, 48 Am. Dec. 754; *Dickman v. Williams*, 50 Miss. 500.

77. *First Nat. Bank v. New York Cent., etc.*, R. Co., 85 Hun (N. Y.) 160, 32 N. Y. Supp. 604; *Robert C. White Live Stock, etc., Co. v. Chicago, etc.*, R. Co., 87 Mo. App. 330; *Storey v. Hershey*, 19 Pa. Super. Ct. 485, but when the parties to a transfer of a bill of lading know that the property has been taken, prior to the transfer, by legal process, from the possession of the carrier, the indorsement and delivery of the bill of lading cannot operate as a transfer of the possession of the property. See also *Dickson v. Merchants' Elevator Co.*, 44 Mo. App. 498.

78. *First National Bank v. Northern Pac. Ry. Co.*, 28 Wash. 439, 63 Pac. 965; *Merchants' Despatch, etc., Co. v. Merriam*, 111 Ind. 5; *Pennsylvania R. Co. v. Stern*, 119 Pa. St. 24, 4 Am. St. Rep. 626; *Illinois Cent. R. Co. v. Miller*, 32 Ill. App. 259; *Young v. East Alabama Ry. Co.*, 80 Ala. 100; *Lake Shore, etc., R. Co. v. National Live Stock Bank*, 59 Ill. App. 451; *Forbes v. Boston, etc., R. Co.*, 133 Mass. 154, 9 Am. & Eng. R. Cas. 76; *Union Pac. R. Co. v. Johnston*, 45 Neb. 57, 63 N. W. 144. Where the bill of lading is attached to a draft, which is accepted and indorsed by the consignee and paid with money advanced by a third party on the security of the bill of lading, the carrier is liable to the holder of the bill of lading, where the shipper procured a delivery to himself while the goods were in transit. *Wells v. Oregon, etc., R. Co.*, 32 Fed. 51.

79. *Gates v. Chicago, etc., R. Co.*, 42 Neb. 379, 61 Am. & Eng. R. Cas.

whether a bill of lading has been issued, and, if it has, to deliver only to the party producing such bill properly indorsed, where indorsement is necessary.⁸⁰ The delivery of goods to a carrier will not be held to be a delivery to the consignee, where by taking the bill of lading to his own order the shipper reserves to himself the power of disposing of the property; and, though a bill of lading is fraudulently used, a bank cashing a draft with the bill attached acquires a good title to the property in question, and is entitled to receive the goods, and the carrier cannot defend by showing delivery to another.⁸¹ Under the New York statute it is an offense for a carrier to deliver any property carried by it without a production and surrender of the bill of lading, or unless it bears on its face the words "not negotiable." Under this statute it has been held that the carrier is liable where it delivers the goods without requiring a surrender of the bill of lading where the bill has not the words mentioned written across its face, although they are written across the back.⁸² But where a carrier issues a bill of lading which requires it to take up such bill on the delivery of the goods, but delivers the goods, on the order of the consignee, without taking up the bill, which is afterwards assigned to a third person for a valuable consideration, such third person cannot recover from the carrier for a conversion of the goods, since the bill

218, 60 N. W. 583, holding, also, that a common carrier which delivers goods to a purchaser from the consignee, who is the agent of the owner, at the direction of the consignee, is not liable to the owner upon the purchaser's failure to pay therefor, although the bill of lading is not surrendered to the carrier before delivery, where it is not assigned to any one by the owner. See also *Schwartzchild & Co. v. Savannah, etc., R. Co.*, 76 Mo. App. 623, 1 Mo. A. Repr. 588.

80. *Merchants' Cotton Press, etc., Co. v. Insurance Co. of North America*, 151 U. S. 368, and the fact that the contract between the carrier and the shipper is illegal on account of

rebates being improperly allowed to the shipper does not affect the right of the holder of the bill of lading as against the carrier.

81. *Illinois Cent. R. Co. v. Southern Bank*, 41 Ill. App. 287. But a carrier is not liable to the transferee of a bill of lading on account of the delivery of the goods called for to the consignee by agents of the transferee, who were ignorant of the transfer, while it was at a compress operated by the transferee. *Missouri, etc., R. Co. v. McFadden*, 89 Tex. 138, 33 S. W. 853.

82. *Syracuse First Nat. Bank v. New York Cent. etc., R. Co.*, 85 Hun (N. Y.) 160, 32 N. Y. Supp. 604; N. Y. Penal Code, § 633.

when received by him was a spent bill, and did not operate to pass title to the goods.⁸³ And the fact that a common carrier negligently omitted to take up the bill of lading upon which an endorsement "non-negotiable" did not appear, when it delivered the goods represented thereby, although it was in fact non-negotiable, and therefore, the carrier may have become technically guilty of a violation of the statute, does not entitle a subsequent *bona fide* transferee of the bill of lading, which has been fraudulently altered so as to make it negotiable, to maintain an action against the carrier to recover damages for his neglect, for the reason that the forgery was not the proximate result of such neglect, but was the independent and felonious act of another person.⁸⁴ It is no defense to a carrier for failure to deliver goods to the *bona fide* holder of a bill of lading therefor, that the same were attached and seized for a debt of the consignor, where such attachment and seizure were made possible by a change of destination of the goods under an arrangement between the consignor, the carrier, and a third person, which was not binding upon the holder of such bill.⁸⁵ Where a shipper takes a bill of lading for the delivery of goods to himself, the carrier is liable for delivery to another person on his mere presentation of the bill of lading unindorsed.⁸⁶ But if

83. *National Commercial Bank v. Lackawanna Transp. Co.*, 172 N. Y. 596, 64 N. E. 1123, affg. 59 App. Div. (N. Y.) 270, 6 N. Y. Supp. 396; *Colgate v. Pennsylvania Co.*, 102 N. Y. 120, affg. 31 Hun (N. Y.) 300.

84. *Mairs v. Baltimore, etc., R. Co.*, 175 N. Y. 409, 67 N. E. 901. A warehouseman who pays a bank which deposits a draft secured by a warehouse receipt of a cargo of peas, which has been accepted by the consignee, upon the claim that the consignee after accepting the draft has without authority taken possession of the peas and obtains a transfer from the bank, together with the warehouse receipt, may bring an action on the draft against the consignee; and the defense that plain-

tiff has wrongfully delivered up the cargo of peas to defendant in violation of N. Y. Penal Code, § 633, forbidding the warehouseman from delivering to another than the holder of a warehouse receipt issued by him the property covered by it, is unavailable. *Burnham v. Cape Vincent Seed Co.*, 142 N. Y. 169.

85. *Western & A. R. Co. v. Ohio Valley Bkg. & T. Co.*, 107 Ga. 512, 15 Am. & Eng. R. Cas. N. S. 839, 33 S. E. 821.

86. *Weyand v. Atchison, etc., R. Co.*, 75 Iowa 573, 9 Am. St. Rep. 504, 1 L. R. A. 650; *Douglass v. People's Bank*, 86 Ky. 176, 5 S. W. 420, 9 Am. St. Rep. 276, 32 Am. & Eng. R. Cas. 511.

the bill of lading is produced, properly indorsed, the carrier is protected by it from liability for delivery to the holder, although the party producing it may have no right to it and may have wrongfully obtained possession of it.⁸⁷ So, if the carrier delivers upon the production of one of two bills of lading indorsed to different persons.⁸⁸ The rule is based upon the familiar principle of law that where one of two innocent parties must suffer, the loss should fall upon him who enabled the third person to commit the wrong.⁸⁹ But the rule does not apply where the carrier has issued two bills of lading, and delivery is made to one presenting an unindorsed bill, which does not vest the holder with any apparent ownership.⁸⁹ And where a bill of lading has been issued for property not actually delivered, by an agent having no authority to issue bills except on receipt of property for transportation, and has been transferred by the shipper to one who has, in good faith, discounted a draft drawn upon the consignee, the carrier is liable to the holder of the bill of lading.⁹¹ A bill of lading, while not negotiable in the sense that a bill of exchange or promissory note is negotiable, where the purchaser need not look beyond the instrument itself,⁹² is negotiable in the sense that it may be transferred by indorsement and delivery, but the transferee, however innocent,

87. *Douglas v. Peoples Bank*, *supra*. Compare *Cleveland, etc., R. Co. v. Moline Plow Co.*, 13 Ind. App. 225.

88. *Fearon v. Bowers*, 1 Smith's L. C. 792.

89. *Brooks v. New York, etc., R. Co.*, 108 Pa. St. 529, 56 Am. Rep. 235; *American Nat. Bank v. Georgia R. Co.*, 96 Ga. 665, 2 Am. & Eng. R. Cas. N. S. 618, 23 S. E. 898; *Wilmington, etc., R. Co. v. Kitchin*, 91 N. C. 39.

90. *Weyand & Atchison, etc., R. Co.*, 75 Iowa 573, 9 Am. St. Rep. 504, *revq.* 30 Am. & Eng. R. Cas. 102, 33 N. W. 133; *St. Louis, etc., R. Co. v. Larned*, 103 Ill. 293.

91. *Bank of Batavia v. New York, etc., R. Co.*, 106 N. Y. 195, 60 Am.

Rep. 440, 7 Cent. Repr. 822; *Sioux City, etc., R. Co. v. First Nat. Bank of Fremont*, 10 Neb. 556, 35 Am. Rep. 488; *Armour v. Michigan Cent. R. Co.*, 65 N. Y. 111; *St. Louis, etc., R. Co. v. Larned*, 103 Ill. 293; *Brooke v. New York, etc., R. Co.*, 108 Pa. St. 529. To the contrary see note 106 N. Y. 195.

92. *Friedlander v. Texas, etc., R. Co.*, 130 U. S. 424, 32 L. Ed. 994; *Pollard v. Vinton*, 105 U. S. 8, 26 L. Ed. 998; *Shaw v. Merchants' Nat. Bank*, 101 U. S. 557, 25 L. Ed. 892; *Stollenwerck v. Thacher*, 115 Mass. 24; *Raleigh, etc., R. Co. v. Lowe*, 101 Ga. 320, 28 S. E. 867, 10 Am. & Eng. R. Cas. N. S. 398; *Gurney v. Behrend*, 3 El. & Bl. 622, 633.

takes only the rights which the transferee had.⁹³ If, however, a custom or usage exists for a carrier at the point of destination to deliver to a consignee goods consigned to him by a bill of lading, not containing the words "or order," without requiring the production of the bill of lading, such a delivery is good as against a person to whom the consignee has previously delivered the bill of lading as security for an advance made by him to the consignee.⁹⁴ It is no excuse for a delivery to the wrong person that the indorsee of the bill of lading was unknown to the carrier and notice of the arrival could not be given, or that he delayed too long before calling for his goods; diligent inquiry for the consignee, or indorsee of a bill of lading for delivery to order, is required of the carrier, and if either cannot be found, the duty of the carrier is to retain the goods until they are claimed, or to store them in a reasonably safe place for and on account of their owner. It has no right, under any circumstances, to deliver to a stranger.⁹⁵

§ 10. Carrier entitled to demand bill of lading.

The consignee is presumptively the owner of the goods, and a delivery to him, without notice to the contrary, will discharge the carrier.⁹⁶ If the party who claims the goods is not the consignee, and even where he is the consignee, the carrier is entitled to demand the production of the bill of lading in order to obtain possession of the goods, and for its own security, because of the assignability of bills of lading whereby all rights in the goods may be transferred to a stranger, should require it to be presented before making delivery either to the consignee or the holder of the bill.⁹⁷

93. *Merchants' Bank v. Union R., etc., Co.*, 69 N. Y. 374; *Pollard v. Vinton*, 105 U. S. 7; *Lallande v. His Creditors*, 42 La. Ann. 705, 45 Am. & Eng. R. Cas. 301; *Douglass v. Peoples Bank*, 86 Ky. 176, 5 S. W. 420; *Empire Transp. Co. v. Steele*, 70 Pa. St. 188.

94. *Forbes v. Boston, etc., R. Co.* 133 Mass. 154. See § 20, *post*. See also *Richardson v. Goddard*, 23 How. (U. S.) 28.

95. *The Thames*, 14 Wall. (U. S.) 98; *Galloway v. Hughes*, 1 Conk. Adm. 96. See *Laches of Holder of bill of lading*, § 12 *post*.

96. *Sweet v. Barney*, 23 N. Y. 335; *Lawrence v. Minturn*, 17 How. (N. Y.), 100; *O'Dougherty v. Boston, etc., R. Co.*, 1 Thomp. & C. (N. Y.) 477. See also § 4, *ante*.

97. *Bass v. Glover*, 63 Ga. 745, 1 Am. & Eng. R. Cas. 277; *Finn v. Western R. Corp.*, 102 Mass. 283.

This is a reasonable regulation necessary to protect the carrier from any loss, although the carrier may only be entitled to a receipt after being shown the bill of lading and may not require the holder to surrender the bill.⁹⁸ For the carrier will be liable to a *bona fide* holder of the bill of lading if it delivers the goods to the consignee after he has assigned the bill of lading.⁹⁹ The statute in New York makes it the duty of a carrier not to deliver goods except upon production and cancellation of the bills of lading, and for a delivery to a consignee without the production of the bill of lading, which provided for a delivery to him, but which he had in the meantime indorsed and negotiated, the carrier is liable to the holder of the bill as for a conversion of the property.¹ And it is liable to the shipper for the loss sustained by him, where it delivers goods to the consignee, in violation of instructions of the shipper not to deliver without a bill of lading.²

§ 11. Carrier's liability to innocent purchaser of bill of lading.

A carrier, in delivering goods to a party claiming them, without requiring him to produce the bill of lading, always assumes the risk of the bill's having been previously transferred to an innocent purchaser.³ Where a common carrier delivers goods entrusted to him for carriage, without production of the bill of lading describing the goods, it is liable in trover for their value to a *bona fide* holder of such bill, taken for value, before the delivery of the goods at destination;⁴ even where it delivered the goods

Compare Gulf, etc., R. Co. v. McCown (Tex. Civ. App.), 25 S. W. 435.

Where no bills of lading are issued, the carrier is justified in delivering the goods to the consignee without the production of receipts or other evidences of ownership issued to the consignor. *Schlichting v. Chicago, etc., Ry. Co.* (Iowa), 96 N. W. 959.

98. *Dwyer v. Gulf, etc., R. Co.*, 69 Tex. 707, 32 Am. & Eng. R. Cas. 461.

99. See § 11.

1. *Furman v. Union Pac. R. Co.*, 106 N. Y. 579, 32 Am. & Eng. R. Cas.

500; *Colgate v. Pennsylvania Co.*, 102 N. Y. 120; *Bank of Commerce v. Bissell*, 72 N. Y. 615.

2. *Foggan v. Lake Shore, etc., R. Co.*, 16 N. Y. Supp. 25.

3. *Pennsylvania R. Co. v. Stern*, 119 Pa. St. 24, 4 Am. St. Rep. 626; *Gates v. Chicago, etc., R. Co.*, 42 Neb. 379, 61 Am. & Eng. R. Cas. 218; *Midland Nat. Bank v. Missouri, etc., R. Co.*, 1 Mo. App. Rep. 417.

4. *Peoria Bank v. Northern R. Co.*, 58 N. H. 203; *Houston, etc., R. Co. v. Adams*, 49 Tex. 748, 30 Am. Rep. 116.

to the shipper at an intermediate point.⁵ But it is not liable where the transfer of the bill takes place after the delivery to the consignee, since the innocent purchaser takes only such title as his transferee had, and the latter's title had been extinguished by delivery.⁶ A railroad company which makes one of a firm which is almost the only consignee of goods delivered at a station its agent at such station, charged with the responsibility of the business as between the company and the firm, is liable to an innocent purchaser of a bill of lading for goods consigned to such firm, which have been delivered to it without surrender of the bill of lading.⁷

§ 12. Laches of holder of bill of lading.

Laches on the part of the holder of a bill of lading cannot be assumed from delay by the holder in presenting it and demanding delivery of the goods, unless by reason of the delay the carrier may have lost a remedy or could not protect itself.⁸ And a carrier cannot avoid its obligation under a bill calling for delivery to the shipper's order, to deliver the shipment to an indorsee for value of the bill upon presentation thereof, by a custom of such carrier to deliver the property to the consignee after six days, if the indorsee was without notice that the carrier had acted under such custom, although he may have been aware of the custom.⁹ But the holder of a bill of lading may lose his rights by negligence, as where a bank, to which is delivered for collection a draft, together with a bill of lading (requiring notice to the drawer) for a carload of feed issued by a transportation company, which permits the drawee to pay the draft by discounting

5. *Ratzer v. Burlington, etc., R. Co.*, 64 Minn. 245, 66 N. W. 988, 4 Am. & Eng. R. Cas. N. S. 55.

6. *Alabama Nat. Bank v. Mobile, etc., R. Co.*, 42 Mo. App. 284.

7. *Walters v. Western, etc., R. Co.*, 56 Fed. 369, 61 Am. & Eng. R. Cas. 162.

8. *First Nat. Bank of Syracuse v. New York Cent. etc., R. Co.*, 85 Hun (N. Y.), 160, 66 St. Rep. (N. Y.)

112, 32 N. Y. Supp. 604; *Barber v. Meyerstein, L. R.* 4 H. L. 317, L. R. 2 C. P. 38, holding that notice is not necessary, and that only a failure of ordinary prudence in completing his security would amount to laches.

9. *Midland Nat. Bank v. Missouri Pac. R. Co.*, 132 Mo. 492, 2 Am. & Eng. Corp. Cas. N. S. 586, 33 S. W. 521.

his draft on a third person attached to the bill of lading, gave no notice to the railroad company that it held the bill of lading and the feed was delivered by the carrier to one to whom the drawer consigned it. The bank in such case cannot recover from the railroad company.¹⁰ While the assignee or indorsee of a bill of lading may, by his laches, lose his right to claim the goods from an innocent purchaser, by permitting the property to remain under the control and apparent ownership of his assignor or endorser, the transfer of the bill of lading passes the complete title to the assignee or endorsee, and he is not required to take possession of the property immediately upon its arrival, or to give notice to the carrier or warehouseman in charge of it.¹¹

§ 13. Goods received from connecting carrier.

It is the duty of a carrier to ascertain whether a bill of lading was delivered to the shipper, and if so, to detain the property until demanded by one claiming under that title; if delivery is made without it, he runs the risk of showing a delivery in accordance with its instructions. If the owner or consignor has placed a direction upon the property, showing where it is to be transported, and obtained a bill of lading for it, he has a right to assume that delivery will only be made in accordance with the terms of the bill, and the duty of the carrier is only thereby discharged.¹² The contract contained in and evidenced by the receipt or bill of lading binds each and every one of the connecting carriers who accept the goods and transport them over its line,¹³ and they are charged with knowledge of the contents of the bill of lading.¹⁴ A carrier receiving goods from another carrier is, therefore, liable for a delivery to the wrong person without a

10. *National Bank v. Philadelphia, etc., R. Co.*, 163 Pa. St. 467, 61 Am. & Eng. R. Cas. 162, 30 Atl. 228.

11. *Farmers', etc., Nat. Bank v. Logan*, 74 N. Y. 568; *Forbes v. Boston, etc., R. Co.*, 133 Mass. 154, 9 Am. & Eng. R. Cas. 78.

12. *Furman v. Union Pac. R. Co.*, 106 N. Y. 579, 32 Am. & Eng. R. Cas. 500.

13. *Babcock v. Lake Shore, etc., R. Co.*, 49 N. Y. 497; *Maghee v. Camden, etc., R. Co.*, 45 N. Y. 514; *Halliday v. St. Louis, etc. R. Co.*, 74 Mo. 159.

14. *City Bank v. Rome, etc., R. Co.*, 44 N. Y. 136; *Howard v. Shepard*, 9 M. Gr. & S. 296; *Tyndale v. Taylor*, 4 El. & Bl. 219; *Colgate v. Pennsylvania Co.*, 102 N. Y. 120.

production by him of the bill of lading, where one has been issued, and is not excused by the fact that such delivery was made in accordance with papers received from the preceding carrier in which a different consignee from the one in the bill of lading is named.¹⁵ The contrary, however, has been held where the carrier which made the delivery had no notice of the bill of lading, or the fact that it had been issued, and was ignorant of the true ownership of the goods.¹⁶ The initial carrier is the agent of the consignor in forwarding goods and delivering them to a connecting line,¹⁷ but such agency does not relieve the connecting carrier from liability for failure to demand the production and surrender of the bill of lading before delivery of the goods, when it knows, or ought to have known, that a bill of lading had been issued and was outstanding.¹⁸

§ 13a. Where stoppage in transitu is provided.

Where a carload of lumber was shipped under a waybill providing for stoppage en route at a planing mill, and delivery to the planing mill company, that the lumber might be planed and then reshipped to destination, and the lumber was destroyed by fire while at the planing mill, it was then in the possession of the plaintiff or his agent, the planing mill company, so that defendant's liability was terminated for the time being, and it was not liable for the destruction of the lumber without its fault.¹⁹

§ 14. Stoppage in transitu as a defense.

The right of stoppage *in transitu* is defeated by the transfer of a bill of lading to a *bona fide* indorsee before the right of stop-

15. *Furman v. Union Pac. R. Co.*, 106 N. Y. 579, 32 Am. & Eng. R. Cas. 500; *Alderman v. Eastern R. Co.*, 115 Mass. 233; *Ratzer v. Burlington, etc., R. Co.*, 64 Minn. 245, 66 N. W. 988, 4 Am. & Eng. R. Cas. N. S. 55.

16. *National Bank v. Philadelphia, etc., R. Co.*, 163 Pa. St. 467; *Nanson v. Jacob*, 93 Mo. 331, 3 Am. St. Rep. 531.

17. *Mallory v. Burritt*, 1 E. D. Smith (N. Y.), 234; *Moses v. Port*

Townsend, etc., R. Co., 5 Wash. 595, 55 Am. & Eng. R. Cas. 419; *Wells v. Thomas*, 27 Mo. 17, 72 Am. Dec. 228; *Briggs v. Boston, etc., R. Co.*, 6 Allen (Mass.), 246, 83 Am. Dec. 626; *Bird v. Georgia R. Co.*, 72 Ga. 655, 27 Am. & Eng. R. Cas. 39.

18. See delivery to holder of bill of lading, § 9, *ante*.

19. *Barron v. Mobile & O. R. Co.*, 2 Ala. App. 555, 56 So. 862.

page is exercised, the assignment of the bill of lading transferring the title to the property, upon the principle that whenever one of two innocent persons must suffer by the act of a third, he who has enabled the third person to do or occasion the injury must suffer the loss.²⁰ The carrier cannot, therefore, relieve itself from liability for failure to deliver the property to the holder of the bill of lading by showing that it had delivered it upon a stoppage *in transitu* to the consignor. If the transfer of a bill of lading by way of a pledge or mortgage, or as collateral security for a loan, does not absolutely defeat the right of stoppage *in transitu*, the seller cannot exert that right until he has discharged the debt secured by the transfer, as his right is subject to that of the mortgagee or pledgee.²¹

§ 15. Holder of bill of lading has priority over creditors.

delivery, passes to the transferee whatever title the transferee had to the property at the time. Goods covered by a bill of lading pledged for the acceptance and payment of a draft are not, therefore, subject in the hands of a carrier to the levy of an attachment by creditors as the property of the consignor.²² A consignee of goods is not entitled to a preference for a balance of advances made by him to the consignor, over the claims of a holder of a draft to secure which bills of lading for the goods have been transferred by the consignor, when the goods were not shipped in payment of such advances, since a bill of lading, by the commercial law as well as by the statute, when legally transferred, gives title to the property which it represents.²³

20. *Dows v. Greene*, 24 N. Y. 641; *Dows v. Perrin*, 16 N. Y. 325; *Dows v. Rush*, 28 Barb. (N. Y.) 157; *Wells v. Oregon R., etc., Co.*, 32 Fed. 51, 12 Sawy. (U. S.) 519; *Lickbarrow v. Mason*, 2 T. R. 63, 6 East, 21, 1 Smith's L. Cas. 753; *Gurney v. Behrend*, 3 El. & Bl. 622, 77 E. C. L. 622.

21. *Missouri Pac. R. Co. v. Heidenheimer*, 82 Tex. 195, 27 Am. St. Rep.

861, 49 Am. & Eng. R. Cas. 73 note; *Chandler v. Fulton*, 10 Tex. 24, 60 Am. Dec. 188.

22. *Dickson v. Merchants' Elevator Co.*, 44 Mo. App. 498; *Neill v. Rogers Bros. Produce Co.*, 41 W. Va. 37, 23 S. E. 702.

23. *Starksville First Nat. Bank v. Meyer*, 43 La. Ann. 1, 8 So. 433.

§ 16. Effect of the word "notify" in bill of lading.

The direction in a bill of lading to "notify" a given party shows that such party is not intended as the consignee. If he is, the word is wholly unnecessary. It is the duty of the carrier to notify the consignee of the arrival of the goods. If no one is named as consignee in the bill, no delivery should be made to any one who does not produce it.²⁴ Directions in a bill of lading to notify a person other than the consignee of the arrival of the shipment does not authorize the carrier to deliver the shipment to such person without the production of a bill of lading.²⁵ For such a delivery the carrier is liable to a bank which has discounted drafts drawn against the consignment on the security of receipts endorsed over to it by the shipper and consignee.²⁶ The holder of the bill of lading, properly indorsed to him and which is attached to a draft which he has paid, is not obliged to notify the carrier not to deliver to the party to whom notification is to be given, nor to do anything to prevent such a delivery, except to present the bill of lading and demand delivery within a reasonable time.²⁷ A *bona fide* holder for value without notice of a bill of lading which stipulates for the delivery of the goods to the shipper's order at a designated point, with direction to notify a third person, is not affected by a prior agreement or custom among the consignor, the carrier, and such third person, to the effect that the latter may, without production of the bill, change the destination of the goods.²⁸ A carrier of freight under a bill of

24. *Furman v. Union Pac. R. Co.*, 106 N. Y. 579, 32 Am. & Eng. R. Cas. 500, revg. 35 Hun (N. Y.), 669. See also *Colgate v. Pennsylvania Co.*, 102 N. Y. 120.

25. *Union Stock Yards Co. v. Westcott*, 47 Neb. 300, 3 Am. & Eng. R. Cas. N. S. 375, 66 N. W. 419.

26. *North Pennsylvania R. Co. v. Commercial Bank*, 123 U. S. 727, 35 Am. & Eng. R. Cas. 556; *Libby v. Ingalls*, 124 Mass. 503. See also *North v. Merchants, etc., Transp. Co.*, 146 Mass. 315, 32 Am. & Eng. R. Cas. 509, note.

27. *Chester Nat. Bank v. Atlanta, etc., Air Line R. Co.*, 25 S. C. 216.

28. *Western, etc., R. Co. v. Ohio Valley Bkg. & T. Co.*, 107 Ga. 512, 33 S. E. 21, 15 Am. & Eng. R. Cas. N. S. 839. A bank may, after reimbursing the owner of the goods, maintain an action against a common carrier for an unauthorized delivery of them when it turned them over to parties for whom it had reason to believe they were ultimately intended, taking an indemnifying check for security, which it later surrendered, when the goods were delivered to one whom the

lading requiring notice to the purchaser from the consignee is liable as carrier until it has placed the car in a proper place for examination by the purchaser.²⁹

§ 17. Bill of lading attached to draft.

Where the shipper or owner of property consigns the property shipped to the purchaser upon payment of draft attached to the bill of lading for the purchase price of the goods, the title to the property does not pass to the purchaser, and the purchaser, though named as consignee, is not entitled to a delivery of the property, until he has accepted and paid the draft accompanying the bill of lading and received the bill of lading; and a delivery to him before the draft is paid and the bill of lading delivered to him, or without requiring the production of the bill of lading properly indorsed, will render the carrier liable to the shipper or owner of the property for the amount of the draft if the purchaser fails to pay for the property.³⁰ Where the consignor of property, upon its shipment and before delivery, draws a bill of exchange upon the consignee and procures the same to be discounted at a bank upon the security of a bill of lading which is transferred and delivered with it, the bank acquires title to the property described in the bill of lading, conditional upon the acceptance of the draft by the consignee; upon such acceptance, the title passes to the acceptor; but upon refusal to accept, the title continues unimpaired in the bank, and upon the receipt by the consignee of the property and its conversion, he is liable to the bank for the money advanced upon it.³¹ And upon delivery of

bill of lading directed to be notified, who had possession of such bill, which he had purloined from the bank. *Raleigh, etc., R. Co. v. Lowe*, 101 Ga. 320, 28 S. E. 867, 10 Am. & Eng. R. Cas. N. S. 398.

29. *W. B. Johnson & Co. v. Central Vermont Ry. Co.*, 84 Vt. 486, 79 Atl. 1095.

30. *Commercial Bank v. Chicago, etc., R. Co.*, 160 Ill. 401; *Libby v. Ingalls*, 124 Mass. 503; *Finn v. Western R. Corp.*, 102 Mass. 283; *Walters*

v. Western, etc., R. Co., 63 Fed. 391; *Wells v. Oregon, etc., R. Co.*, 32 Fed. 51, 12 Sawy. (U. S.) 519, but the carrier cannot deliver the goods to the shipper while in transit; *Houston, etc., R. Co. v. Adams*, 49 Tex. 748, 30 Am. Rep. 116.

31. *Commercial Bank v. Pfeiffer*, 108 N. Y. 242; *Marine Bank v. Wright*, 48 N. Y. 1; *Peters v. Elliott*, 78 Ill. 321; *Michigan Cent. Ry. Co. v. Phillips*, 60 Ill. 190; *Illinois Cent. R. Co. v. Southern Bank, etc.*, 41 Ill.

the goods to the consignee in such a case without requiring him to produce the bill of lading, the carrier is guilty of a conversion of the goods and liable accordingly.³² Where a bill of lading is indorsed by the consignor and negotiated for value as security for a draft drawn on a third person by the consignor, the carrier cannot deliver the goods to such third person without the production of the bill of lading, or authority from the holder thereof, and if it makes such a delivery it will be liable to the holder of such bill.³³ But since indorsement of the bill of lading transfers only such title as the consignor had, evidence is admissible to prove ownership in such third person.³⁴

§ 18. Effect of bill of lading as estoppel.

A carrier is liable upon a bill of lading issued in its name by an agent having no authority to issue bills except on receipt of

App. 287; *Chicago Fifth Nat. Bank v. Bayley*, 115 Mass. 228; *Hathaway v. Haynes*, 124 Mass. 311.

32. *Jeffersonville, etc., R. Co. v. Irvin*, 46 Ind. 180; *McEwen, v. Jeffersonville, etc., R. Co.*, 33 Ind. 368 5 Am. Rep. 216, 32 Am. & Eng. R. Cas. 508, note; *Joslyn v. Grand Trunk R. Co.*, 51 Vt. 92; *Alderman v. Eastern R. Co.*, 115 Mass. 233; *Allen v. Williams*, 12 Pick. (Mass.) 297. The fact that the delivery of the goods to the party whom the carrier was directed to notify was in accordance with the custom and course of business at the station where delivery was made will not relieve the carrier from liability to the holder of the draft with the bill of lading attached, unless it was known and assented to by the shipper. *North Pennsylvania R. Co. v. Commercial Bank*, 123 U. S. 727, 35 Am. & Eng. R. Cas. 556.

Acceptance of time draft.—A bank to which a bill of lading is forwarded with a time draft attached for collection, without special instructions,

must surrender the bill of lading to the drawee upon his acceptance of the draft, and is not bound to retain it, as the inference is that the transaction is a sale on credit, and that the bill of lading is security for an acceptance, and not for payment of the draft. *Commercial Bank v. Chicago, etc., R. Co.*, 160 Ill. 401, 43 N. E. 756, affg. 58 Ill. App. 438.

33. *Newcomb v. Boston, etc., R. Corp.*, 115 Mass. 230; *Alderman v. Eastern R. Co.*, 115 Mass. 233; *The Thames*, 14 Wall. (U. S.) 98; *Wichita Savings Bank v. Atchison, etc., R. Co.*, 20 Kan. 519; *Boatmen's Savings Bank v. Western, etc., R. Co.*, 81 Ga. 221; *Chester Nat. Bank v. Atlanta, etc., Air Line R. Co.*, 25 S. C. 216; *Neill v. Rogers Bros. Produce Co.*, 41 W. Va. 37; *Lake Shore, etc., R. Co. v. National Live Stock Bank*, 59 Ill. App. 451; *The Argentina, L. R.* 1 Adm. Eccl. 370; *The Emilinen Marie*, 32 L. T. N. S. 435.

34. *Empire Transp. Co. v. Steele*, 70 Pa. St. 188.

property for transportation to one who, upon transfer by the shipper upon the faith of the bill, has, in good faith discounted a draft drawn upon the consignee, although there was no actual delivery of the property; the carrier is bound by its agent's acts and is estopped from denying the receipt of the goods.³⁵ This rule is maintained in New York and certain other states, and the reasons upon which the rule is based are, substantially, that the question does not depend upon the negotiability of bills of lading but upon the settled doctrine of the law of agency that where a principal has clothed his agent with power to do an act upon the existence of some extrinsic fact, necessarily and peculiarly within the knowledge of the agent, and of the existence of which the act of executing the power is itself a representation, the principal is estopped from denying the existence of the fact, to the prejudice of a third person, who has dealt with the agent or acted on his representation, in good faith, in the ordinary course of business, pursuant to his apparent power. Force is added to this reasoning by the facts that, while bills of lading are not negotiable in the sense applicable to commercial paper, they are commonly transferred as security for loans and discounts, carry with them the ownership, either general or special, of the property which they describe, and are viewed and dealt with by the commercial world as *quasi* negotiable, and consequently it is desirable that they

35. *Bank of Batavia v. New York, etc.*, R. Co., 106 N. Y. 195, 60 Am. Rep. 440, 19 Abb. N. C. ((N. Y.) 131; *Brooke v. New York, etc.*, R. Co., 108 Pa. St. 529, 2 East Repr. 125, 56 Am. Rep. 235; *Armour v. Michigan Cent. R. Co.*, 65 N. Y. 111, 22 Am. Rep. 603; *Griswold v. Haven*, 25 N. Y. 595, 601; *New York, etc.*, R. Co. v. *Schuyler*, 34 N. Y. 30; *North River Bank v. Aymar*, 3 Hill (N. Y.), 262; *Sioux City, etc.*, R. Co. v. *First Nat. Bank of Fremont*, 10 Neb. 555; *St. Louis, etc.*, R. Co. v. *Larned*, 103 Ill. 293; *Wichita Bank v. Atchison, etc.*, R. Co., 20 Kan. 519; *Smith v. Missouri Pac. R. Co.*, 74 Mo. App. 48; *St. Louis, etc.*, R. Co. v. *Adams*, 4

Kan. App. 305, 45 Pac. 920; *Adams Express Co. v. Schlessinger*, 75 Pa. St. 216; *Louisville, etc.*, *Packet C. v. Rogers*, 20 Ind. App. 594, 49 N. E. 970.

In an action by parties who had paid drafts accompanying a bill of lading against a carrier for the value of goods which the carrier never received, based on the proposition that the carrier, having issued a bill of lading, was estopped to deny their receipt, the plaintiff must prove that the bill of lading was actually issued by defendant or by its authority. *Droste v. Wabash R. Co.*, 138 N. Y. Supp. 203, 153 App. Div. 160.

should be viewed with confidence and not distrust and should pass free from one to another and advances be made upon their faith; and that because of these considerations it is better to cast the risk of the goods not having been shipped upon the carrier, who has placed it in the power of agents of his own choosing to make these representations, rather than upon the innocent consignee or endorsee, who, as a rule, has no means of ascertaining the fact other than the representations of the carrier's own agent.³⁶ On the contrary, it is held by the Federal courts, the courts of many of the states, and the authorities in England that a bill of lading issued by a station or shipping agent of a railroad company or other common carrier, without receiving the goods named in it for transportation, imposes no liability upon the carrier, even to an innocent consignee or indorsee for value, and that the carrier is not estopped by the statements in the bill from showing that no goods were in fact received for transportation, and that the rule is the same whether the act of the agent was fraudulent and collusive, or merely the result of a mistake.³⁷ Of course this is predicated upon the assumption that the authority of the agent is limited to issuing bills of lading for freight received before, or concurrent with, the issuing of the bills, which would be the presumption in the absence of evidence to the contrary. A carrier

36. See cases cited under note 35, *supra*.

37. *Friedlander v. Texas, etc., Ry. Co.*, 130 U. S. 416, 28 Cent. L. J. 503, note; *St. Louis, etc., R. Co. v. Commercial U. Ins. Co.*, 139 U. S. 223, 35 L. Ed. 154, 11 Sup. Ct. Rep. 554; *Pollard v. Vinton*, 105 U. S. 7; *Robinson v. Memphis, etc., R. Co.*, 9 Fed. 129; *The Freeman*, 18 How. (U. S.) 182, 191, 59 U. S. 182; *The Lady Franklin*, 8 Wall. (U. S.) 325; *St. Louis, etc., R. Co. v. Knight*, 122 U. S. 79, 87, 7 Sup. Ct. 1132, 30 L. Ed. 1077; *National Bank v. Railroad Co.*, 44 Minn. 224, 20 Am. St. Rep. 566, 9 L. R. A. 263; *Sears v. Wingate*, 3 Allen (Mass.), 103; *Baltimore & O.*

R. Co. v. Wilkens, 44 Md. 11; *Fellows v. The R. W. Powell*, 16 La. Ann. 316; *Hunt v. Mississippi Cent. R. Co.*, 29 La. Ann. 446; *Louisiana Nat. Bank v. Laveille*, 52 Mo. 380; *Williams v. Wilmington, etc., R. Co.*, 93 N. C. 42; *Dean v. King*, 22 Ohio St. 118; *Chandler v. Sprague*, 38 Am. Dec. 410, note; *Grant v. Norway*, 10 C. B. 665; *Coleman v. Riches*, 16 C. B. 104; *Hubbersty v. Ward*, 8 Exch. 330; *Brown v. Powell D. S. Coal Co.*, L. R. 10 C. P. 562; *McLean v. Fleming*, L. R. 2 Sc. App. Cas. 128; *Cox v. Bruce*, L. R. 18 Q. B. Div. 147; *Meyer v. Dresser*, 15 C. B. (N. S.) 646; *Jessel v. Bath*, L. R. 2 Exch. 267.

may adopt a different mode of doing business by giving his agents authority to issue bills of lading for goods not received, so as to render him liable in such cases to third parties.³⁸ The reasoning by which the latter doctrine is usually supported is that a bill of lading is not negotiable in the sense in which a bill of exchange or promissory note is negotiable, where the purchaser need not look beyond the instrument itself; that so far as it is a receipt for the goods it is susceptible of explanation or contradiction, the same as any other receipt; that the whole question is one of the law of agency; that it is not within the scope of the authority of the shipping agent of the carrier to issue bills of lading where no property is in fact received for transportation; that the extent of his authority, either real or apparent, is to issue bills of lading for freight actually received; that this real and apparent authority, *i. e.*, the power with which his principal has clothed him in the character in which he is held out to the world, is the same, viz., to give bills of lading for goods received for transportation, and that this limitation upon his authority is known to the commercial world; and therefore, any person purchasing a bill of lading issued by the agent of a carrier acts at his own risk as respects the existence of the fact (the receipt of the goods) upon which alone the agent has authority to issue the bill, the rule being that if the authority of an agent is known to be open for exercise only in a certain event, or upon the happening of a certain contingency, or the performance of a certain condition, the occurrence of the event or the happening of the contingency, or the performance of the condition, must be ascertained by him who would avail himself of the results ensuing from the exercise of the authority.³⁹

38. *National Bank v. Railroad Co.*, 44 Minn. 224, 20 Am. St. Rep. 566, 9 L. R. A. 263.

39. See cases cited, note 37, *supra*.

Carrier's liability to assignor of bill of lading.—A. bought a certain quantity of iron, as called for by a bill of lading, and sold the same to an iron company, who paid for it, and to whom it was delivered. The iron company recovered a judgment

against A. for a shortage. Held, that this judgment did not conclude the carrier issuing the bill of lading, although the carrier was notified by A. to defend, as the defenses available to the carrier would not have exonerated A. from liability to the iron company. *Garrison v. Baggage Transp. Co.*, 94 Mo. 130, 32 Am. & Eng. R. Cas. 525.

§ 19. Duplicate bills of lading.

Where bills are issued in sets of two or more, and the several parts of the bill are transferred to different parties who respectively make advances upon the faith of the bill, the property in the goods passes to the first transferee, unless a subsequent transferee has a superior equity to that of being, like the first, a *bona fide* transferee for value.⁴⁰ Where the several bills issued provided that when delivery is made on one the others are to be void, a delivery by the carrier upon presentation of a duplicate bill of lading properly indorsed is a discharge of the carrier from further liability.⁴¹ Where the original bill of lading contains no such provision the carrier is liable to a *bona fide* holder thereof for failure to deliver to him, and proof of the delivery to a holder of a properly indorsed duplicate will be no defense.⁴² Where the consignor received from the carrier a bill of lading containing a provision that the goods should be delivered to the consignee upon the presentation of a duplicate of such bill of lading, the carrier was held liable for delivering the goods without requiring the production of the duplicate.⁴³ But where the consignor, upon receiving two bills of lading, sends one of them with a draft attached, to a bank for collection of the draft, and sends the other to the consignee, who presents it and receives the goods, he is estopped from maintain-

40. *Skilling v. Bollman*, 6 Mo. App. 676; *Meyerstein v. Barber*, L. R. 44 L. 317; *Sanders v. McLean*, 11 Q. B. Div. 327.

41. *Glyn v. East, etc., India Dock Co.*, L. R. 7 App. 591; *Skilling v. Bollman*, 73 Mo. 665, 39 Am. Rep. 537.

42. *Midland Nat. Bank v. Missouri Pac. R. Co.*, 132 Mo. 492.

Where a railroad company issues two delivery orders for the same grain, both orders being in the same form and containing nothing to show that they related to the same consignment, such company is liable to third persons making advances on both orders. *Coventry v. Great Eastern R. Co.*, 11 Q. B. Div. 776.

43. *McEwen v. Jeffersonville, etc., R. Co.*, 33 Ind. 368, 5 Am. Rep. 216; *The Saugerties*, 44 Fed. 625.

Duplicate bills of lading copied from the stub books from which the original bills were issued, by the local agent some time after such issuance, are inadmissible in evidence as against the carrier. They are within the rule that the declarations of an agent as to a past transaction are not admissible to bind his principal. *Edgerton v. Wilmington, etc., R. Co.*, 115 N. C. 645, 20 S. E. 184, 61 Am. & Eng. R. Cas. 253; *Missouri Pac. R. Co. v. Heidenheimer*, 82 Tex. 195, 27 Am. St. Rep. 861.

ing an action against the carrier for a wrongful delivery by the fact that he himself clothed the consignee with apparent authority to receive.⁴⁴

§ 20. Necessity of indorsement of bill of lading.

Under the law merchant bills of lading were transferable by delivery merely.⁴⁵ Where a bill of lading directs a delivery to bearer, or to a named consignee or bearer, the delivery of the bill passes the title to the property, and the carrier is entitled to deliver to any one holding the bill without any indorsement.⁴⁶ The delivery of a bill of lading, with intent to pass the title, has that effect, though drawn to order, and not indorsed.⁴⁷ But, except where the bill of lading directs a delivery to bearer, the carrier is responsible for delivering to any one but the original holder of the bill of lading, unless it is properly indorsed by him; a delivery to a third person on an unindorsed bill of lading is always at the risk of the carrier.⁴⁸ Where the goods are consigned to a party named but, by the bill of lading, the consignor retains the right of disposition over the goods, the delivery of the bill of lading for value, without indorsement, transfers the title to the property covered by the bill and justifies a delivery by the carrier to the

44. *Weyand v. Atchison, etc., R. Co.*, 75 Iowa, 573, 9 Am. St. Rep. 504.

45. *Scharff v. Meyer*, 133 Mo. 428, 42 Cent. L. J. 367; *Crowell v. Van Bibber*, 18 La. Ann. 637; *Par. Mer. Law*, 346; 2 Kent's Com.

46. *Allen v. Williams*, 12 Pick. (Mass.) 297; *Nathan v. Giles*, 5 Taunt. 558; *Low v. DeWolf*, 8 Pick. (Mass.) 101.

47. *City Bank v. Rome, etc., R. Co.*, 44 N. Y. 136; *Merchants' Bank v. Union R. & Transp. Co.*, 69 N. Y. 376; *Michigan Cent. R. Co. v. Phillips*, 60 Ill. 190; *Western Ry. Co. v. Wagner*, 65 Ill. 197; *Green Bay First Nat. Bank v. Dearborn*, 115 Mass. 219; *Jeffersonville, etc., R. Co. v.*

Irvin, 46 Ind. 180; *Becker v. Hallgarten*, 86 N. Y. 167; *Bank of Rochester v. Jones*, 4 N. Y. 497; 55 Am. Dec. 290; *Richardson v. Nathan*, 167 Pa. St. 513; *American Zinc, etc., Co. v. Markle Lead Works*, 102 Mo. App. 158, 76 S. W. 668; *The Carlos F. Roses*, 177 U. S. 655, 40 L. Ed. 929.

48. *Capehart v. Granite Mills*, 97 Ala. 353, 12 So. 44; *Jordan v. Pennsylvania Co.*, 18 Am. & Eng. R. Cas. 647, 31 Alb. L. J. 250; *Sword v. Young*, 89 Tenn. 126, 45 Am. & Eng. R. Cas. 384; *Weyand v. Atchison, etc., R. Co.*, 75 Iowa, 573, 9 Am. St. Rep. 504, 33 N. W. 133, revg. 30 Am. & Eng. R. Cas. 102; *Cavallaro v. Texas, etc., R. Co.*, 110 Cal. 348.

holder of the bill.⁴⁹ The rule is the same, in the case of a sale of the goods, if the right to dispose of the property is, by the bill of lading, retained by the consignor.⁵⁰ Proof of a custom to deliver without indorsement, unless it be shown that the party injured thereby knew and acted with knowledge of the custom, will not excuse a delivery by the carrier upon the presentation of an undorsed bill of lading.⁵¹ Where an invoice of goods shows that the delivery is to be made only to the party producing the bill of lading, delivery to the holder of the invoice without requiring production of the bill of lading will render the carrier liable.⁵²

§ 21. Carrier's liability for misdelivery.

Common carriers deliver property at their peril and must take care that it is delivered to the right party. The obligation to deliver to the proper person is absolute and is rigorously enforced by the courts, and the law allows no excuse for a wrong delivery, except the fault of the shipper himself. When there is any doubt as to who is the proper person to make delivery to and it can be determined by the bill of lading or other documentary evidence, its production should be required by the carrier, and the property detained until demanded by one claiming under such a title.⁵³ If

49. *Marine Bank v. Wright*, 48 N. Y. 1; *Bank of Rochester v. Jones*, 4 N. Y. 497, 55 Am. Dec. 290; *Holmes v. German Security Bank*, 87 Pa. St. 525; *Phelps v. Bank*, 2 McGloin (La.), 19; *Green Bay First Nat. Bank v. Dearborn*, 115 Mass. 219; *Cairo First Nat. Bank v. Crocker*, 11 Mass. 163; *Davenport Nat. Bank v. Homeyer*, 45 Mo. 145, 100 Am. Dec. 363; *Valle v. Cerre*, 36 Mo. 576, 88 Am. Dec. 161.

50. *Weyand v. Atchison, etc., R. Co.*, 75 Iowa, 573, 9 Am. St. Rep. 504.

51. *Louisville, etc., R. Co. v. Barkhouse*, 100 Ala. 543; *Weyand v. Atchison, etc., R. Co.*, *supra*.

52. *Pennsylvania R. Co. v. Stern*, 119 Pa. St. 24, 4 Am. St. Rep. 626; *North Pennsylvania R. Co. v. Commercial Bank*, 123 U. S. 727.

53. *N. Y.—Security Trust Co. v. Wells Fargo Express*, 178 N. Y. 620, 70 N. E. 1109, affg. 81 App. Div. (N. Y.) 426, 80 N. Y. Supp. 830; *Furman v. Union Pac. R. Co.*, 106 N. Y. 579, 32 Am. & Eng. R. Cas. 500; *McEntee v. New Jersey Steamboat Co.*, 45 N. Y. 34, 6 Am. Rep. 28; *City Bank v. Rome, etc., R. Co.*, 44 N. Y. 136; *Scheu v. Erie R. Co.*, 10 Hun (N. Y.), 498; *Oswego Bank v. Doyle*, 91 N. Y. 32, 43 Am. Rep. 634; *Packard v. Getman*, 4 Wend. (N. Y.) 613, 21 Am. Dec. 166; *Sonn v. Smith*, 57 App. Div. (N. Y.) 372, 68 N. Y. Supp. 217.

Ark.—Little Rock, etc., R. Co. v. Glidewell, 39 Ark. 487, 18 Am. & Eng. R. Cas. 539.

Dak.—Waldron v. Chicago, etc., R. Co., 1 Dak. 336.

delivery be made to the wrong person, either by an innocent mistake, or through the fraud, imposition, or deceit of a third person, as upon a forged order, the carrier will be responsible, and the wrongful delivery will be treated as a conversion.⁵⁴ That the

Ill.—*St. Louis, etc., R. Co. v. Rose*, 20 Ill. App. 670; *Indianapolis, etc., R. Co. v. Vanduzen*, 81 Ill. 143; *American Express Co. v. Baldwin*, 26 Ill. 504, 79 Am. Dec. 101.

Mass.—*Forbes v. Boston, etc., R. Co.*, 133 Mass. 154; *Mahon v. Blake*, 125 Mass. 477; *Hall v. Boston, etc., R. Co.*, 14 Allen (Mass.), 439, 92 Am. Dec. 783; *Claffin v. Boston, etc., R. Co.*, 7 Allen (Mass.), 341.

Mich.—*Gibbons v. Farwell*, 63 Mich. 344, 6 Am. St. Rep. 301, 29 N. W. 855.

Minn.—*Jellett v. St. Paul, etc., R. Co.*, 30 Minn. 265, 15 N. W. 237.

Mo.—*Cole v. Wabash, etc., R. Co.*, 21 Mo. App. 443; *Erschine v. Steamboat Thames*, 6 Mo. 371.

N. H.—*Smith v. Nashua, etc., R. Co.*, 27 N. H. 86, 59 Am. Dec. 354.

Pa.—*Wernwag v. Philadelphia, etc., R. Co.*, 117 Pa. St. 46, 20 W. N. C. (Pa.) 150, 32 Am. & Eng. R. Cas. 515; *Graff v. Bloomer*, 9 Pa. St. 114.

Tenn.—*Sword v. Young*, 89 Tenn. 126; *Bloomington v. Memphis, etc., R. Co.*, 6 Lea (Tenn.), 618, 6 Am. & Eng. R. Cas. 371; *Erie Despatch v. Johnson*, 87 Tenn. 490, 11 S. W. 441.

Tex.—*Houston, etc., R. Co. v. Adams*, 49 Tex. 748, 30 Am. Rep. 116; *Missouri, etc., R. Co. v. Seley*, 31 Tex. Civ. App. 158, 72 S. W. 89.

Vt.—*Winslow v. Vermont, etc., R. Co.*, 42 Vt. 700, 1 Am. Rep. 365.

Eng.—*Fowles v. Great Western R. Co.*, 7 Exch. 699, 22 L. J. Exch. 76; *Richards v. London, etc., R. Co.*, 7 C. B. 839, 62 E. C. L. 839; *Moffatt v.*

Great Western R. Co., 15 L. T. N. S. 630; *Hoare v. Great Western R. Co.*, 25 W. R. 63; *Youl v. Harbottle*, "Peake N. P. 49.

Delivery to one who had been consignor's agent.—In an action against a carrier for the conversion of goods by delivering them to the person to whom they were consigned and who had been plaintiff's agent, after termination of the agency and notice by plaintiff not to do so, it is no defense that such person had a lien on the goods for freight paid, where it appears that he at the time owed plaintiff a larger sum. *Lester v. Delaware, etc., R. Co.*, 92 Hun (N. Y.), 342, 36 N. Y. Supp. 907.

54. *McEntee v. New Jersey Steamboat Co.*, 45 N. Y. 34, 6 Am. Rep. 28; *Guillame v. Hamburg & Am. Packet Co.*, 42 N. Y. 212; *Powell v. Myers*, 26 Wend. (N. Y.) 590; *Hawkins v. Hoffman*, 6 Hill (N. Y.), 586 *Shenk v. Philadelphia Steam Propeller Co.*, 60 Pa. St. 109, 100 Am. Dec. 541.

Misdelivery through mistake.—*Chicago, etc., R. Co. v. Ames*, 40 Ill. 249, mistake in marking the number of a car; *Wilson v. Wabash, etc., R. Co.*, 23 Mo. App. 50, mistake in making out shipping bills; *Arlington v. Wilmington, etc., R. Co.*, 6 Jones L. (N. C.) 68, 72 Am. Dec. 559, mistake in the waybill of the carrier; *Clement v. New York Cent., etc., R. Co.*, 9 N. Y. Supp. 601, goods delivered to third party by mistake.

Fraud and misrepresentation.—*Viner v. New York, etc., Steamship*

delivery was made in accordance with the usual course of business and the carrier's usual custom at the destination of the goods, will not relieve the carrier from liability for misdelivery, except under special circumstances where it clearly appears that the party injured was aware of the custom and acted with knowledge of it.⁵⁵

No amount of care or caution will relieve the carrier, since it is not a question of want of care or negligence; the carrier's undertaking as an insurer is to deliver safely as well as to carry safely; its liability as an insurer extends to a delivery to the proper party, and its warranty as an insurer is broken by a misdelivery.⁵⁶ It is the duty of the carrier in all cases to be diligent in its efforts to secure a delivery of the property to the person entitled, and where delivery is to be made to the consignee or any other particularly specified person, the carrier is bound to require evidence of identity of the party claiming delivery as the real party entitled, and it cannot properly, or without incurring liability to the true owner, deliver goods to any person who calls for them other than the rightful owner, and cannot plead imposition practiced by others as a defense to an action for misdelivery.⁵⁷ A carrier will

Co., 50 N. Y. 23; *Wilson Sewing Machine Co. v. Louisville, etc., R. Co.*, 71 Mo. 203; *Houston, etc., R. Co. v. Adams*, 49 Tex. 748, 30 Am. Rep. 116; *Winslow v. Vermont, etc., R. Co.*, 42 Vt. 700, 1 Am. Rep. 365; *South, etc., Alabama R. Co. v. Wood*, 66 Ala. 167, 41 Am. Rep. 749, 9 Am. & Eng. R. Cas. 419; *American Sugar Refining Co. v. McGhee*, 96 Ga. 27; *Price v. Oswego, etc., R. Co.*, 50 N. Y. 213, 10 Am. Rep. 475. *Compare* *Dunbar v. Boston, etc., R. Corp.*, 110 Mass. 26, 14 Am. Rep. 576.

55. *Sinsheimer v. New York, etc., R. Co.*, 21 Misc. Rep. (N. Y.) 45, 46 N. Y. Supp. 887; *Hall v. Boston, etc., R. Corp.*, 14 Allen (Mass.), 439, 92 Am. Dec. 783; *Winslow v. Vermont, etc., R. Co.*, 42 Vt. 700, 1 Am. Rep. 365. *Compare* *Bush v. St. Louis, etc., R. Co.*, 3 Mo. App. 62. See also, § 20, note 30.

56. *Forbes v. Boston, etc., R. Co.*, 133 Mass. 154, 9 Am. & Eng. R. Cas. 76; *Hall v. Boston, etc., R. Corp.*, 14 Allen (Mass.), 439, 92 Am. Dec. 783; *South, etc., Alabama R. Co. v. Wood*, 66 Ala. 107, 41 Am. Rep. 749, 9 Am. & Eng. R. Cas. 419; *Bodenham v. Bennett*, 4 Price 31; *Richards v. London, etc., R. Co.*, 7 C. B. 839, 62 E. C. L. 839, 18 L. J. C. P. 251.

57. *Price v. Oswego, etc., R. Co.*, 50 N. Y. 213, 10 Am. Rep. 475, 3 Am. Ry. Rep. 325, revg. 58 Barb. (N. Y.) 599; *McEntee v. New Jersey Steamboat Co.*, 45 N. Y. 34, 6 Am. Rep. 28; *Powell v. Myers*, 26 Wend. (N. Y.) 591; *Baltimore, etc., R. Co. v. Pumphrey*, 59 Md. 390, 9 Am. & Eng. R. Cas. 331; *Pacific Express Co. v. Shearer*, 160 Ill. 215; *Ten Eyck v. Harris*, 47 Ill. 268; *Sword v. Young*, 89 Tenn. 126, 129, 14 S. W. 481, 604. See also, § 6, Delivery to fraudulent purchaser.

be protected in refusing delivery until reasonable evidence is furnished it that the party claiming is the party entitled, so long as it acts in good faith and with a sole view to a proper delivery,⁵⁸ and it may refuse to deliver to a consignee who is not identified, although he may offer security, and an action cannot be maintained by such person against the carrier based upon such refusal.⁵⁹ Where, however, the relation of the parties is not that of carrier and owner or consignee, or where the responsibility of the carrier has terminated and that of a warehouseman has commenced or exists, the strict rule of responsibility as insurer does not prevail, and the carrier is responsible for proper diligence and care only in the preservation of the property and its delivery to the true owner, and liable only for losses resulting from its own negligence.⁶⁰ The delivery of goods by a carrier at destination, without requiring the surrender of a bill of lading, as required by a stipulation therein, does not involve any breach of duty to the consignor, if the delivery is made to the consignee, or upon his order, or by his authority.⁶¹

§ 22. Delivery to one of two persons of the same name.

A shipper may recover for goods delivered to the wrong consignee, through the carrier's failure to exercise ordinary and

58. *McEntee v. New Jersey Steamboat Co.*, 45 N. Y. 34, 6 Am. Rep. 28.

59. *Houston, etc., R. Co. v. Adams*, 49 Tex. 761, 30 Am. Rep. 116; *Gulf, etc., R. Co. v. Freeman*, 4 Tex. App. Civ. Cas. 245. Compare *Thomas v. Pacific Express Co.*, 30 Mo. App. 86, wherein it is held that a consignor of goods sent by express, which are not delivered at their destination but brought back to the place of shipment, cannot be refused the return of the goods to him because of a rule of the express company requiring identification of consignees.

60. *Burnell v. New York Cent. R. Co.*, 45 N. Y. 184, 6 Am. Rep. 61; *Carroll v. Southern Express Co.*, 37 S. C. 452.

61. *Chicago Packing & P. Co. v.*

Savannah, etc., R. Co., 103 Ga. 140, 29 S. E. 698, 40 L. R. A. 367, 10 Am. & Eng. R. Cas. N. S. 391.

A consignor waives his right of action for conversion against the carrier for the delivery of the goods to the consignee without the production of the bill of lading, as required by the terms thereof, by taking the consignee's acceptance of a draft drawn against the shipment, after he knew that the goods had been delivered without a production of the bill of lading, and that his intention to prevent a delivery of the goods until payment of the purchase price had been thereby defeated. *Southern R. Co. v. Kinchen*, 103 Ga. 186, 29 S. E. 816.

proper care, as where the carrier delivers goods to an imposter or swindler who ordered them in the name of a responsible person; and the right to recover is not dependent upon the shipper's discovering the fraud and stopping the goods *in transitu*.⁶² But the carrier is not liable for a misdelivery, where there are two persons of the same name in the same place, in delivering goods to one of the two when the other was intended as the consignee, where there is nothing in the marking on the shipment or in the bill of lading to indicate which of the two is intended as consignee, and delivery is made to the person who produces the bill of lading and demands the goods. The loss must be borne by the consignor because of his negligence in not marking the shipment more specifically.^{62a}

A carrier is not liable for misdelivery in delivering to that one of two men of the same name in the same town who orders the goods shipped, although the shipper believed the order was from and intended the goods to go to the other, notwithstanding the purchaser fraudulently assumed such name in buying, provided he was known by it at the place of destination.⁶³ But a mere similarity of names is no defense to an action for misdelivery in delivering goods to the wrong party.⁶⁴ Delivery by an express company of goods received by it under a contract for their delivery to a specified consignee at a point beyond its terminal office, to an agent of such consignee duly authorized to receive them, completes the contract of carriage, although the goods were not

62. *Wilson v. Adams Express Co.*, 43 Mo. App. 659, 27 Mo. App. 360; *Pacific Express Co. v. Critzer* (Tex. Civ. App.), 42 S. W. 1017. See also, § 6, *ante*.

62a. *Bush v. St. Louis, etc., R. Co.*, 3 Mo. App. 62. In the case cited the carrier had tendered the goods to the consignee intended, who said he had not ordered them and refused them, and the company then stored them as warehousemen and subsequently delivered them on demand and production of the bill of lading to the other person of the same name. It was held that the company, as warehouse-

men, were liable for due diligence only; that they were not chargeable, under the circumstances, with negligence; and there had not been a misdelivery.

The rule that the owner must bear the loss in case of a misdelivery arising from his improperly marking the package—applied where the package was carried to the wrong place, and there destroyed by fire, without fault of the carrier. *Southern Express Co. v. Kaufman*, 12 Heisk. (Tenn.) 161.

63. *Southern Express Co. v. Os-kamp*, 14 Ohio C. C. 176, 7 Ohio Dec. 417.

ordered by the consignee to whom the shipper really intended to send them, but by another person bearing, or pretending to bear, the same name, to whom the goods were finally delivered after passing through the hands of the real consignee's agent.⁶⁵

§ 23. Place of delivery.

In the absence of special contract or a statute fixing the place of delivery, a carrier's contract of carriage is not completed, but its obligation continues, until delivery at its depot or warehouse where goods are customarily unloaded and delivered at the place of destination of the goods; and an offer by the carrier to deliver at such place, except where personal delivery is requisite, is sufficient, without regard to where the consignee may actually be.⁶⁶ A consignee of goods is entitled to receive them at the place where the carrier undertook to deliver them, and is under no obligation to receive them elsewhere.⁶⁷ An attempt by the carrier to deliver at a new and unusual place will render it liable for all losses or injuries which might have been avoided by delivery at the proper place;⁶⁸ and a refusal to deliver at the place agreed upon and subsequent delivery elsewhere will render the carrier liable for actual damages sustained, as well as punitive damages for a wilful failure to deliver.⁶⁹ On a consignment of goods to a place where

64. *Wernwag v. Philadelphia, etc., R. Co.*, 117 Pa. St. 46, 32 Am. & Eng. R. Cas. 515; *Houston, etc., R. Co. v. Adams*, 49 Tex. 748, 30 Am. Rep. 116, 32 Am. & Eng. R. Cas. 508.

65. *Southern Express Co. v. Williams*, 99 Ga. 482, 27 S. E. 743.

66. *D. Klass Commission Co. v. Wabash R. Co.*, 80 Mo. App. 164, 2 Mo. App. Repr. 545; *Loeb v. Wabash R. Co.*, — Mo. App. —, 85 S. W. 118, and delivery is not completed by the carrier sidetracking cars at its yards; see 209, 254; *Cox v. Peterson*, 30 Ala. 608, 68 Am. Dec. 145, and the acceptance of a part of such goods will not bar a suit for non-delivery of the remainder; 194, 367.

A contract to carry goods to a cer-

tain place cannot be made to bind the carrier to deliver them at another station, either for the reason that the goods were addressed to the consignee at such other station or because the consignee was described as being at such other station. *Wheeler v. St. Louis, etc., R. Co.*, 3 Mo. App. 358, nor is such a contract complied with by delivering the freight at a point short of such destination. *Loomis v. Wabash R. Co.*, 17 Mo. App. 340.

67. *Gulf, etc., R. Co. v. Clark*, 2 Willson, Civ. Cas. Ct. App. (Tex.) 513.

68. *Benbow v. North Carolina R. Co.*, 61 N. C. (Phil. L.) 421, 98 Am. Dec. 76.

As to special damage not proxi-

there is no depot, warehouse, agent, or even side track, it is the duty of the carrier, in case the consignee is not present to receive the goods, to unload them and leave them there on the ground, if not goods susceptible to injury; and the carrier has no right because the consignee is not present, to carry them on to the next station and leave them on a side track, and is liable for the value of the goods if it does so.⁷⁰ But where there are two stations in a town for the reception and delivery of freight by a railroad company, the usage of the place may be shown to aid the jury in determining at which one freight addressed to the town generally ought to have been delivered.⁷¹ In the absence of a custom author-

mate result.—Where, in an action against a carrier for failure to deliver cotton at the destination named in the bill of lading, the consignor claimed damages suffered by reason of the consignee's refusal to accept after having procured samples, which he would not have done if the cotton had been delivered at the proper place, plaintiff could not recover, in the absence of proof that the carrier was instrumental in permitting the consignee to procure the samples, or that it had any knowledge of the contract between plaintiff and the consignee, since such damages were special, and not the proximate result of the carrier's breach of contract. *Gulf, etc., Ry. Co. v. Pickens* (Tex. Civ. App.), 58 S. W. 156.

69. *Stricker v. Leathers*, 68 Miss. 803, 9 So. 821, 13 L. R. A. 600.

70. *Louisville, etc., R. Co. v. Gilmer*, 89 Ala. 534, 42 Am. & Eng. R. Cas. 450, 7 So. 654. See also, *South, etc., Alabama R. Co. v. Wood*, 72 Ala. 451, 18 Am. & Eng. R. Cas. 634.

As to goods susceptible to injury a consignee has been held not to be entitled to have them delivered at a certain station where the accommodations were insufficient to receive all

classes of goods, and the carrier was accustomed to deliver minerals there, but other goods at its general goods station, some distance away. *Thomas v. North Staffordshire R. Co.*, 3 Ry. & C. T. Cas. 1.

Freight destined to switches or side tracks.—Defendant, as a connecting carrier, received a car load of freight, consigned to H., for transportation to a point on its road where it had neither freight agent nor depot building. The bill of lading issued by the initial carrier showed that the freight charges were paid, and provided that delivery of freight destined to switches or side tracks having no agent should be complete upon switching the car at such side track. Defendant carried the car to the point indicated, and side-tracked it on a switch in front of the office of a lumber company, for whom the freight was really intended, though consigned to H. The manager of the lumber company, without consent of either defendant or the consignor, broke open the car, which was sealed and locked, unloaded its contents, and carried the same away, and failed to pay a draft made upon him for its value. In an action it was held that

izing the agent of a carrier, at the request of the consignee, after the car has reached its destination, to undertake to deliver it to another place, or to another person than the consignee, such an undertaking is nothing more than a personal accommodation on the part of the agent, and cannot render his principal liable.⁷² None of the carriers in transit has a right to require the owner to receive goods elsewhere than at the destination named in the contract of shipment. He is not obliged to receive them at a transshipping point, where a connecting carrier refused to receive them because they were damaged.⁷³ The duty of a carrier, in the absence of orders from the shipper, to exercise reasonable care to protect his interest in a sudden emergency like a strike preventing the forwarding of perishable goods to their destination, is violated by shipping the goods over another line of its system to another place and selling them there at a less price than could have been obtained at the place of destination, to which the goods might have been forwarded by another available route.⁷⁴ So, the carrier is liable for loss resulting from deviation from the selected route, when the freight was not of such perishable nature as to necessitate its immediate transshipment, without notice to the shipper.^{74a} Delivery must be made by the carrier at a reasonably safe and convenient place for the consignee to receive the goods, and if

the delivery was complete, and that defendant was not liable to the consignor for the loss of the contents of the car. *Hill v. St. Louis, etc., Ry. Co.*, 67 Ark. 402, 55 S. W. 216.

71. *Homesly v. Elias*, 66 N. C. 330. The delivery of cotton by defendant at its wharf at West Wego, which is on the opposite side of the river from New Orleans, was a compliance with the bill of lading requiring its delivery at the port of New Orleans, although West Wego was not at that time within the boundaries of the port of New Orleans, as defined in the statute, it being, in a well understood commercial and business sense, the part of that port where steamship companies rightfully expected to

receive cotton from Texas for transportation to European ports. *Reiss v. Texas, etc., R. Co.*, 98 Fed. 533, 39 C. C. A. 149; *Texas, etc., R. Co. v. Reiss*, 99 Fed. 1006, 39 C. C. A. 680, *affd. Texas, etc., R. Co. v. Reiss*, 183 U. S. 621, 22 Sup. Ct. 253, 46 L. Ed. 358; *Marande v. Texas, etc., R. Co.*, 102 Fed. 246, 42 C. C. A. 317.

72. *Melbourne v. Louisville, etc., R. Co.*, 88 Ala. 443, 6 So. 762.

73. *Gulf, etc., R. Co. v. A. B. Frank Co. (Tex. Civ. App.)*, 48 S. W. 210.

74. *Alabama & V. R. Co. v. Brichetti*, 72 Miss. 891, 18 So. 421, 530.

74a. *Louisville & N. R. Co. v. Odil*, 96 Tenn. (12 Pickle) 61, 33 S. W. 611. See also, *Liability for delay*, chap. 8.

made at an unusual and unfit place the carrier will be liable.⁷⁵ If the consignee accepts a delivery of the goods at a place or in a manner different from what a common carrier is liable by law to deliver them, the business of removing them becomes from that time his business, and the carrier cannot be held liable for the acts or omissions of those employed to do the work.⁷⁶ But a shipper of goods billed for a designated place does not relieve the initial carrier from liability as an insurer of their safe delivery at various intermediate points according to an agreement between him and the carrier to whom he directed them to be delivered, incurred by such initial carrier's wrongful delivery of them to another carrier, by paying the latter the freight for the entire route to induce it to deliver goods at one of the intermediate points, and an agreement by it to carry the remaining portion to their destination at its own cost.⁷⁷ An option given a carrier by contract as to the place of delivery to the owner is waived by its refusal to deliver at all.⁷⁸ A carrier, by placing a car of goods on a side track at a point designated as most convenient for unloading by the person to whom the consignee has sold the goods and directed the carrier to deliver them without presentation of bill of lading, and by notifying such person thereof, makes a sufficient delivery to him of the goods as against one to whom the consignee thereafter transfers the bill of lading.⁷⁹ A deposit of goods with notice, express or implied, by an initial carrier, at any place where the second carrier has control of them, conformably with usage created by the course of business between the two carriers, is a sufficient delivery to discharge the initial carrier.⁸⁰ Where a railroad places

75. *Benbow v. North Carolina R. Co.*, 61 N. C. (Phil. L.) 421, 98 Am. Dec. 76. Delivery must be made at the place of business of the consignee and not at that of another party. *Mahon v. Blake*, 125 Mass. 477.

76. *Jewell v. Grand Trunk R. Co.*, 55 N. H. 84, 11 Am. Ry. Rep. 596.

77. *Brown & Haywood Co. v. Pennsylvania Co.*, 63 Minn. 546, 65 N. W. 961, 2 Am. & Eng. R. Cas. N. S. 640. See also *Waiver*, § 36, *post*.

78. *Buckeye Pipe Line Co. v. Fee*,

15 Ohio Civ. Ct. R. 637, 8 O. C. D. 727.

79. *Anchor Mill Co. v. Burlington, etc., R. Co.*, 102 Iowa, 262, 71 N. W. 255.

80. *Texas, etc., R. Co. v. Clayton*, 51 U. S. App. 676, 84 Fed. 305, 9 Am. & Eng. R. Cas. N. S. 821, 28 C. C. A. 142; *Aetna Ins. Co. v. Wheeler*, 5 Lans. (N. Y.) 480, *affd.* 49 N. Y. 616; *Mills v. Michigan Cent. R. Co.*, 45 N. Y. 622, 6 Am. Rep. 152; *Van Santvoord v. St. John*, 6 Hill (N. Y.), 157; *Converse v. Norwich Transp.*

bulky freight to be unloaded by the consignee at the point designated by him, and possession is turned over to him, its liability as a carrier terminates, and it is liable for subsequent damages only when they result from its negligence.⁸¹ Under a statute, requiring a common carrier to deliver property to the consignee at the place to which it is addressed in the manner usual at that place, a railroad company is liable for freight, as an insurer, until delivery to the consignee as provided.⁸² The extraordinary liability of a carrier as insurer of the goods continues until the proper delivery at the destination.⁸³ When goods are received by a carrier for shipment, the common-law liability of the carrier as an insurer attaches, until the goods reach the point of destination and the consignee has been notified.⁸⁴

§ 24. Right of owner or consignee to change place of delivery.

The instructions of the owner or freighter, as to the delivery of goods, must be obeyed, and he may change their destination while *in transitu* and direct delivery at an intermediate point without changing the contract with the carrier. No responsibility for loss is incurred by the carrier where it obeys such instructions, but it is liable if the directions given are not obeyed.⁸⁵ Where delivery

Co., 33 Conn. 166; *Hewitt v. Chicago*, etc., R. Co., 63 Iowa, 611, 19 N. W. 790; *Truax v. Philadelphia*, etc., R. Co., 3 Houst. (Del.) 233; *Pratt v. Grand Trunk R. Co.*, 95 U. S. 43, 24 L. Ed. 336; *Palmer v. Chicago*, etc., R. Co., 56 Conn. 137, 13 Atl. 818; *Kentucky*, etc., Ins. Co. v. *Western & A. R. Co.*, 67 Tenn. (8 Baxt.) 268.

81. *Chicago*, etc., Ry. Co. v. *Kelm*, 121 Minn. 343, 141 N. W. 295.

82. *Jolly v. Atchison & S. F. Ry. Co.*, — Cal. App. —, 131 Pac. 1057.

83. *Arkadelphia Milling Co. v. Smoker Merchandise Co.*, 100 Ark. 37, 139 S. W. 680.

The liability of a drayage company as a common carrier of goods, receiving goods from a car on a house track, continued until it had com-

pleted the carriage by the actual delivery of the goods to the consignees at their place of business. *Id.*

84. *R. W. Williamson & Co. v. Texas & P. Ry. Co.* (Tex. Civ. App.), 138 S. W. 807.

85. *Michigan Southern*, etc., R. Co. v. *Day*, 20 Ill. (10 Peck) 275, 71 Am. Dec. 278; *Strahorn v. Union Stock Yards*, etc., Co., 43 Ill. 424, 92 Am. Dec. 142; *Hartmann v. Louisville*, etc., R. Co., 39 Mo. App. 88; *Scotthorn v. South Staffordshire R. Co.*, 8 Exch. 341; *London*, etc., R. Co. v. *Bartlett*, 7 H. & N. 400, 8 Jur. N. S. 58, 10 W. R. 109; *Cork Distilleries Co. v. Great Southern*, etc., R. Co., L. R. 7 H. L. Cas. 269, 8 Ir. R. C. L. 334; *Sutherland v. Peoria Bank*, 78 Ky. 250, 6 Am. & Eng. R. Cas. 368,

is directed or demanded at an intermediate point, the carrier may demand and is entitled to receive full freight charges for the entire distance, and such incidental expenses as may have been incurred by reason of the change of destination.⁸⁶ But although a consignor or consignee of goods may change his instructions as to their destination, and substitute a different place of delivery, he must do so during the transit, and not after their destination has been reached and the carrier's obligation fulfilled.⁸⁷ After the goods have reached their original destination the undertaking of the carrier for transportation is at an end and it is then the right and interest of the carrier to see that the goods are delivered to

the right is the same where the goods have passed into the hands of a connecting carrier.

86. *The Gazelle*, 128 U. S. 474, a shipowner who is prevented from performing the voyage by a wrongful act of the charterer is *prima facie* entitled to the freight that he would have earned, less what it would have cost him to earn it; *Clark v. Massachusetts, etc., Ins. Co.*, 19 Mass. (2 Pick.) 104, 13 Am. Dec. 400, where a ship was so damaged that it would require two months to repair her, her master may retain the cargo and earn his freight, since neither party is at liberty to abandon the contract of affreightment, but for legal cause, or with the consent of the other; *Braithwaite v. Aikin*, 1 N. D. 475, 48 N. W. 361; *Violett v. Stettinius*, 5 Cranch (C. C.), 559; *Shipton v. Thornton*, 9 Ad. & El. 314, 36 E. C. L. 150; *Luke v. Lyde*, 2 Burr. 887; *Thompson v. Small*, 1 C. B. 328, 50 E. C. L. 328.

Where a common carrier, who has undertaken to carry goods by water to a certain place, is obliged by low water to land, and store them at an intermediate port, and the owner accepts them at the latter place, and

pays all charges for freight and storage, the common carrier is discharged from all subsequent liability on account of his contract. *Bennett v. Byram*, 38 Miss. 17, 75 Am. Dec. 90.

Must be sufficient demand.—The carrier is not liable for failure to deliver at an intermediate station in the absence of proof of a sufficient demand for such delivery. *Worden v. Canadian Pac. R. Co.*, 13 Ont. Rep. 652, 30 Am. & Eng. R. Cas. 127.

Where the consignee of part of the cargo of a vessel which had put into port in distress and was detained four months for repairs demanded his goods, offering to pay full freight and incidental expenses and to sign a general average bond, the vessel was held liable for the damage by leakage and deterioration to the cargo when delivered finally at the port of original destination. *The Martha*, 35 Fed. 313.

87. *Melbourne v. Louisville, etc., R. Co.*, 88 Ala. 443, 6 So. 762, or to another party than the consignee, such an undertaking is nothing more than a personal accommodation on the part of the agent, and cannot render his principal liable.

none but the true owner, so that where an agent collected money for his principal and forwarded it to him by an express company, but the latter could not deliver the same because the consignee could not be found, the agent could not maintain an action against the company, he not being the owner or having any special interest in the goods.⁸⁸ *Prima facie*, the consignee is the owner of the goods in transit, the property therein vesting in the consignee upon delivery to the carrier, the latter being commonly the agent of the consignee, and he only can sue the carrier for non-delivery, though a receipt was given to the consignor.⁸⁹ The carrier is entitled to consider and is bound to treat the consignee as such owner unless it is advised that a different relation exists, or unless notice of such fact is to be implied from the manner of shipment, as where the goods are sent C. O. D.⁹⁰ The carrier is bound to deliver the goods at their destined place, to the consignee, or as the consignee may direct. The carrier is therefore entitled to deliver the goods at a different place from that stated in the instructions of the consignor, when directed to do so by the consignee, or when the consignee is willing to accept them at a different place. The consignee, or his authorized agent, may receive goods addressed to him in the hands of a carrier at any place, either before or after their arrival at their place of destination, and such acceptance operates as a discharge of the carrier from his liability to the consignor. So a delivery in accordance with instructions of the consignee will relieve the carrier from liability for any consequences resulting from a change in the place of delivery.⁹¹ But where

88. *Thompson v. Fargo*, 49 N. Y. 188, 10 Am. Rep. 342; *Duff v. Budd*, 3 Brod. & B. 177, 7 E. C. L. 399; *Krudler v. Ellison*, 47 N. Y. 36, 7 Am. Rep. 402; *Green v. Clarke*, 12 N. Y. 343.

89. *Thompson v. Fargo*, *supra*; *Madison, etc., R. Co. v. Whitesel*, 11 Ind. 55.

90. *Price v. Powell*, 3 N. Y. 322; *Sweet v. Barney*, 23 N. Y. 335.

91. *Sweet v. Barney*, 23 N. Y. 335; *Lewis v. Western R. Corp.*, 11 Metc. (Mass.) 509; *Sutherland v. Peoria*

Bank, 78 Ky. 250, 6 Am. & Eng. R. Cas. 368; *London, etc., R. Co. v. Bartlett*, 7 H. & N. 400; *Mitchell v. Ede*, 11 Ad. & El. 888, 39 E. C. L. 260; *Foster v. Frampton*, 6 B. & C. 107, 13 E. C. L. 111.

Agent with limited authority.—Where dutiable goods are sent into the United States from Canada, marked to the care of another person than the consignee, in order that such person may pay the duties, under an arrangement by which such goods come in bond, this gives the agent no

the consignor is known to the carrier to be the owner, or the carrier has notice, actual or implied, that the ownership of the goods is not in the consignee, the carrier must be understood to contract with the consignor only, for his interest, upon such terms as he dictates in regard to delivery, and the consignee is to be regarded simply as an agent selected by him to receive the goods at the place indicated, and instructions from such a consignee will constitute no defense to an action for a delivery not in accordance with the original instructions of the consignor.⁹²

§ 25. Statutory requirements as to delivery of grain.

Under a statute providing that every railroad company, which shall receive any grain in bulk for transportation, shall deliver it to any elevator, warehouse, or place to which it may be directed, if such warehouse or place can be reached by any track which can be used by the company, where a car of grain is received by a railroad company on its line of road, billed to an elevator on a track, it must deliver the car at the elevator; and it cannot discharge its duty, by leaving it on its own side track,⁹³ nor by delivering it to any warehouse other than that to which it is consigned, except when the consent of the owner or consignee has been obtained.⁹⁴ The relaxation of the common law rule requiring an actual delivery to the consignee, in fixing the liability of railroads, by reason of their inability, because of their methods of transporta-

authority to change their destination; and a carrier who, knowing the limited authority thus conferred upon the agent, upon his order delivers them to persons not entitled to receive them, is liable for a conversion. *Claffin v. Boston, etc., R. Co.* 89 Mass. (7 Allen), 241.

92. *Southern Express Co. v. Dickson*, 94 U. S. (4 Otto) 549.

93. *Galesburg, etc., R. Co. v. West*, 108 Ill. App. 504. The statute applies only to shipments of grain in bulk and not to any other merchandise. *Stetler v. Chicago, etc., R. Co.*, 49 Wis. 609; *Chicago & N. W. R. Co.*

v. Stanbro, 87 Ill. 195, 18 Am. Ry. Rep. 180.

94. *Vincent v. Chicago & A. R. Co.*, 49 Ill. 33, explaining the obligation of railroad corporations, both at common law and under the statute, and the grounds upon which that obligation may be enforced by injunction, with reference to the usages and public interests connected with the management of grain elevators, in Chicago and other cities. *Arthur v. St. Paul, etc., R. Co.*, 38 Minn. 95, 35 N. W. 718, as to usage at Duluth in the delivery of wheat to a public warehouseman.

tion, to make such delivery, and substituting a delivery at a safe depot for a personal delivery,⁹⁵ is not maintained when the consignee's place of business, to which goods are consigned, can be reached by a track used by the railroad company, but the common law rule of an actual delivery applies in such cases.⁹⁶ A statute requiring that all railroad companies shall deliver grain to any elevator that can be reached by any track which "can be used" by such companies does not refer to mere physical possibility. A company cannot be compelled to run cars over a track owned by other persons or for the use of which it has no license or contract.⁹⁷ Nor is the company liable under such a statute, unless the grain was consigned to a particular warehouse at the time of shipment.⁹⁸

§ 26 When place of destination is not on carrier's line.

A carrier is liable for detention of goods addressed to a specified place not on its line "via" of another place on its line, at the latter place, without using reasonable available means to forward them to their destination or notifying the consignee, notwithstanding any custom of its own not communicated to the shipper or consignee. Where there is no connecting carrier to which the goods may be delivered for further transportation, it is the duty of the carrier to store the goods in its warehouse or leave them in charge of some responsible warehouseman at the nearest point on its line to their destination and notify the consignee. Its liability, thereafter, becomes at most that of a warehouseman only.⁹⁹ A carrier of goods, and not the shipper, is liable for the mistakes of its agents or guide books on which it relies as to the proper place of delivery of the goods; and, where a shipment is billed to a point

95. See Acts constituting delivery and acceptance, § 3, chap. 4.

96. *Vincent v. Chicago & A. R. Co.*, 49 Ill. 33; *Merchants' Despatch Transp. Co. v. Hallock*, 64 Ill. 284, rule applied to a corporation of freighters owning a line of freight cars plying between the Atlantic Seaboard and the West; *Coe v. Louisville, etc., R. Co.*, 3 Fed. Rep. 775.

97. *Hoyt v. Chicago B. & Q. R. Co.*,

93 Ill. 601; *Stetler v. Chicago, etc., R. Co.*, 49 Wis. 609.

98. *Chicago, etc., R. Co. v. Stanbro*, 87 Ill. 195, 18 Am. Ry. Rep. 180, a mere demand by the consignee at the place of destination that the grain be delivered at such place is not sufficient to subject the company to the penalties of the statute.

99. *Denver, etc., R. Co. v. DeWitt*, 1 Colo. App. 419, 29 Pac. 524.

which is not on the carrier's line, but near it, what is the proper place of delivery by the carrier is a question for the jury, where the evidence is conflicting.¹

§ 27. Time of transportation and delivery in general.

In respect to the carriage of goods, a common carrier is not an insurer as to the time of the delivery, in the absence of an express contract. While it is responsible for the safety and final delivery thereof, and the general rule is that nothing can exonerate it from that responsibility but the act of God or the public enemy, it is responsible only for the exercise of due diligence in regard to the time of delivery.² A contract for the shipment of goods, which does not specify any particular time for their delivery, requires them to be delivered within a reasonable time after they have been received for transportation, and this is the rule where there is no written contract, as the law implies such a contract; and an action may be maintained on the contract for unreasonable delay in its performance.³ In the absence of special contract there is no absolute duty resting upon a carrier to deliver the goods intrusted to it within what, under ordinary circumstances, would be a reasonable time. The actual circumstances must all be considered, and what is a reasonable time is largely a question of fact dependent

1. *Louisville & N. R. Co. v. Bernheim*, 113 Ala. 489, 21 So. 405.

2. *Cormack v. New York, etc., R. Co.*, 196 N. Y. 442, 90 N. E. 56, revg. judg. 106 App. Div. 909, 110 N. Y. Supp. 1125; *Parsons v. Hardy*, 14 Wend. (N. Y.) 215.

The carrier is under the duty to transport and deliver freight within a reasonable time and is not bound only to the exercise of ordinary care to so transfer and deliver. *Gulf, etc., Ry. Co. v. Shults* (Tex. Civ. App.), 129 S. W. 845.

3. *Ind.*—*Pittsburgh, etc., Ry. Co. v. Knox*, — Ind. —, 98 N. E. 295.

Md.—*Philadelphia, etc., R. Co. v. Lehman*, 56 Md. 209, 40 Am. Rep. 415, 6 Am. & Eng. R. Cas. 194.

Neb.—*Denman v. Chicago, etc., R. Co.*, 52 Neb. 140, 71 N. W. 967.

Tex.—*Texas & P. Ry. Co. v. Langbehn* (Tex. Civ. App.), 150 S. W. 1188; *Gulf, etc., R. Co. v. Baugh* (Tex. Civ. App.), 42 S. W. 245, 43 S. W. 557.

W. Va.—*McGraw v. Baltimore, etc., R. Co.*, 18 W. Va. 361, 41 Am. Rep. 696. See Liability for delay, chap. 8.

A mere statement of a station agent, to one about to deliver goods for shipment over a railroad, that the goods should arrive at the proposed destination at a certain time, is not a contract to carry them within such time. *Sauter v. Atchison, etc., Ry. Co.*, 78 Kan. 331, 97 Pac. 434.

upon such circumstances; and the only duty resting upon the carrier is to use reasonable efforts and due diligence under all the circumstances to forward the goods to their destination.⁴ Whether goods shipped are delivered by the carrier within a reasonable time is a question of fact for the jury, where the facts admit of more than one fair conclusion, and depends upon the circumstances of each case, including the time ordinarily required for carriage between the two points, the preparations made by the carrier, whether ample or not, the effort at despatch, the information given by the shipper of peculiar reasons for speedy transit and delivery, the character of the freight, and kindred circumstances. The mode of conveyance in use by the carrier, the distance the goods are to be transported, the season of the year, the character of the weather where it may interfere with transportation, the ordinary facilities for transportation, the obstacles, if any, interposed by natural causes or the conduct of men to be overcome, are facts to be considered.⁵ The tender by a common carrier, to a consignee, of goods intrusted to its care, must be reasonable in respect to time, place, and manner; and this is a question for the jury. If the goods are tendered after the hours of business, or when the consignee is unable to receive them, such tender will not discharge the carrier.⁶ An offer to deliver freight, or passenger's baggage, if made at a proper time, discharges the carrier from its liability as a carrier, and, if the goods remain afterwards in its custody, it holds them as a bailee, and is accountable for them according to the terms, express or implied, of such bailment. An offer to deliver a money package or specie to a consignee need not be made during banking hours, unless such is the special engagement, or the established usage of the place, in order thus to change the

4. *Geismer v. Lake Shore, etc.*, R. Co., 102 N. Y. 563, 55 Am. Rep. 837, 26 Am. & Eng. R. Cas. 287, revg. 34 Hun (N. Y.), 50. See also, *Brooks v. Delaware, etc.*, R. Co., 88 N. Y. Supp. 961.

5. *Columbus, etc.*, R. Co. v. *Flourney*, 75 Ga. 745; *McGraw v. Baltimore, etc.*, R. Co., 18 W. Va. 361,

9 Am. & Eng. R. Cas. 188, 41 Am. Rep. 696; *Pittsburg, etc.*, R. Co. v. *Hazen*, 84 Ill. 36, 25 Am. Rep. 422; *Pittsburgh, etc.*, R. Co. v. *Hollowell*, 65 Ind. 188, 32 Am. Rep. 63.

6. *Hill v. Humphreys*, 5 W. & S. (Pa.) 123, 39 Am. Dec. 117; *Eagle v. White*, 6 Whart. (Pa.) 505, 37 Am. Dec. 434.

carrier's responsibility to that of a bailee.⁷ Delivery may be made on Sunday or on a legal holiday, unless such delivery is made unlawful by statute or is contrary to established usage, and where there is an established usage or course of dealing the consignee is entitled to a reasonable time after that day to remove the goods.⁸ A railroad company may withhold from the owner goods shipped over its road, for the purpose of ascertaining whether the bill of lading correctly states the amount due, or whether a waybill in its possession sets forth the true amount, but it can hold the goods only for a reasonable time.⁹ A delay of a month in the transportation of freight a distance of thirty-three miles is unreasonable, and the carrier is liable for the damages sustained.¹⁰ A promise, without consideration, made by a carrier's railroad agent to use his best endeavors to deliver to a consignee, at 3 A. M., goods arriving at night, will not support an action for damages for failure to so deliver goods shipped several years afterwards from a station in another State, without any contract by the agent at that point to deliver other than in the ordinary course of business.¹¹ Although a permit issued by a steamship company designated the particular day on which certain goods were to be delivered on the wharf for shipment, a railroad company trans-

7. *Young v. Smith*, 33 Ky. (3 Dana) 91, 28 Am. Dec. 57; *Marshall v. American Express Co.*, 7 Wis. 1, 73 Am. Dec. 381. See *Merwin v. Butler*, 17 Conn. 138; *Pate v. Henry*, 5 Stew. & P. (Ala.) 101.

8. *Shelton v. Merchants' Despatch Transp. Co.*, 59 N. Y. 258; *J. Russell Mfg. Co. v. New Haven Steamship Co.*, 50 N. Y. 121; *Sleade v. Payne*, 14 La. Ann. 457; *Richardson v. Goddard*, 23 How. (U. S.) 28. Demurrage cannot be charged for Sunday and Labor day following the expiration of the time within which the consignee is required to unload. *Gates v. Ryan*, 37 Fed. 154.

Where Sunday and a holiday and two rainy days were part of the five

days within which consignees might discharge the cargo, the question whether they used reasonable diligence in unloading was held to be one for the jury. *Scheu v. Benedict*, 116 N. Y. 510, 15 Am. St. Rep. 426. The owner of goods is entitled to recover for damages occasioned by delivery of the goods on a stormy day. *The Grafton*, 1 Blatchf. (U. S.) 173.

9. *Beasley v. Baltimore & O. R. Co.*, 27 App. D. C. 595.

10. *Chesapeake & O. R. Co. v. Saulsberry*, 91 Ky. Law Rep. 624, 103 S. W. 254.

11. *Lippman v. Pennsylvania R. Co.*, 127 App. Div. 187, 11 N. Y. Supp. 522.

porting the goods to the wharf had no right to disregard the express directions of the shipper that the goods should be delivered on the wharf in the forenoon of that day, and to rely on the statement of such permit; and where the railroad company delivered the goods in the afternoon, and they were refused by the steamship company on account of lack of room on the vessel, the railroad company was liable to the shipper for resulting damages.¹² It is the duty of a carrier receiving freight to be transported to carry it without unnecessary delay and a delay of twenty-four hours at a station on the way will be deemed unnecessary, unless explained by something which the law recognizes as sufficient.¹³ Under a statute requiring carriers to transport goods within a reasonable time and providing that in reckoning what is a reasonable time a delay of two days at the initial point and forty-eight hours at one intermediate point for each one hundred miles of transportation shall not be charged against the carrier as unreasonable, it was held that a carrier was not entitled to a deduction of intervening Sundays, because the law prohibits the running of freight trains on Sundays between sunrise and sunset.¹⁴ But where one of the two days next after the delivery of freight to the carrier for transportation was Sunday, such day was properly deducted, not as Sunday, but as one of the two initial days of non-action which the carrier was entitled to before it was required to begin the transportation.¹⁵ Under a statute requiring carriers to transport freight promptly on receiving notice that prompt shipment is required, notice must be given within such time before shipment that the carrier's agent, notwithstanding his other duties, by exercising reasonable diligence may keep the notice in mind, it not being necessary to give notice of the exact time of shipment; such notice must be given to the shipping agent; and may be given by the consignee or holder of the bill of lading through another, direct notice not being

12. *White v. North German Lloyd S. S. Co.*, 61 Misc. Rep. (N. Y.) 268, 113 N. Y. Supp. 805.

13. *Jeffries v. Chicago, etc., R. Co.*, 88 Neb. 268, 129 N. W. 273.

14. *Watson v. Atlantic Coast Line*

R. Co., 145 N. C. 236, 59 S. E. 55; *Davis & Hooks v. Atlantic Coast Line R. Co.*, 145 N. C. 207, 59 S. E. 53.

15. *Davis & Hooks v. Atlantic Coast Line R. Co.*, *supra*.

essential.¹⁶ Under demurrage and delayage rule of a railroad commission fixing a charge against carriers for each day's detention of a car in transit, without allowance for free time, and allowing a day's free time at transfer points, a carrier is not deprived of such allowance by a delay in transit.¹⁷ Where flour was shipped on February 12, 1906, and thereafter remained in the possession of a railroad company until July 1, when it was found and tendered to plaintiff, plaintiff was bound to receive the flour when tendered notwithstanding the delay; the carrier's liability being to render compensation for damages growing out of the delay, and not for loss of the flour.¹⁸

§ 28. When personal delivery is required.—The common law rule.—Rule as to express companies.

At an early day, when all goods were carried upon land in wagons, it was generally the duty of the carrier to deliver the goods to the consignee personally, or at his place of residence or business. This was so because the carrier could go anywhere with his wagons and make delivery. It, therefore, became the rule, under the common law, that, in the absence of a special contract or usage to the contrary, carriers by land are bound to deliver or tender goods to the consignee at his residence or place of business, and until this is done they are not relieved from their responsibility as carriers.¹⁹ But carriers upon water, as they were confined by their means of transportation to the water, were bound only to deliver

16. *Mills v. Southern Ry. Co.*, 82 S. C. 242, 64 S. E. 238.

17. *Keystone Lumber Yard v. Yazoo & M. V. R. Co.*, 97 Miss. 433, 53 So. 8.

18. *Moody v. Southern Ry. Co.*, 79 S. C. 297, 60 S. E. 711.

19. *Ind.*—*Bansemmer v. Toledo & W. Ry. Co.*, 25 Ind. 434, 87 Am. Dec. 367, but this rule does not apply to common carriers by vessels on the seas, lakes, or navigable rivers, or by railroads.

Ohio.—*Brown (H. W.) v. Mott*, 22 Ohio St. 149.

Mo.—*Bartlett v. The Philadelphia*, 32 Mo. 256.

N. Y.—*Witbeck v. Holland*, 45 N. Y. 13, 6 Am. Rep. 23; *Fenner v. Buffalo, etc., R. Co.*, 44 N. Y. 505, 4 Am. Rep. 709; *Gibson v. Culver*, 17 Wend. (N. Y.) 305, 31 Am. Dec. 297; *Fisk v. Newton*, 1 Den. (N. Y.) 45, 43 Am. Dec. 649.

Eng.—*Evans v. Bristol, etc., R. Co.*, 10 W. R. 559; *Hyde v. Trent Nav. Co.*, 5 T. R. 389; *Birkett v. Willan*, 2 B. & Old. 456; *Storr v. Crowley*, 1 McClel. & T. 129.

their goods upon the wharf or pier; and if the consignee was present, it was his duty at once to take charge of the goods. If he was not present, it was the duty of the carrier to give him notice of the arrival of the goods. If he was absent, dead, or could not be found, the carrier discharged his duty by depositing the goods in a warehouse, subject to the order of the consignee.²⁰ The common law rule as to carriers by land was maintained in the early days of transportation by rail and applied to railroads.²¹ But it was soon perceived that substantially the same rules, and for the same reasons, should be applied to railroad carriers as were applied to carriers by water. The railroad carrier is obliged to stop at the depot, as the water carrier is at the wharf, and unless the consignee is present on the arrival of the goods to take them from the cars, it must, as is the well-known and uniform custom, place them in its freight house. Universal custom, therefore, soon relieved carriers by rail from the duty of personal delivery to the consignee, and carriers by railways, as well as carriers by vessels and boats, were exempted from the duty of personal delivery, as maintained in respect to other carriers by land.²² But this exemption does not extend to express companies, although availing themselves of carriage by rail. Such companies were established for the purpose of extending to the public the advantages of personal delivery enjoyed in all cases of land carriage prior to the introduction of transportation by rail.²³ According to the common law, it is the intendment of the general undertaking of an express company that it will make personal delivery of the goods consigned, as distinguished from a warehouse delivery.²⁴ The

20. *Fenner v. Buffalo, etc., R. Co.*, 44 N. Y. 505, 4 Am. Rep. 709. See § 29, *infra*.

21. *Schroeder v. Hudson River R. Co.*, 12 N. Y. Super. Ct. (5 Duer) 55; *Eagle v. White*, 6 Whart. (Pa.) 505, 37 Am. Dec. 434; *Graff v. Bloomer*, 9 Pa. St. (9 Barr) 114.

22. *Witbeck v. Holland*, 45 N. Y. 13, 6 Am. Rep. 23; *Thomas v. Boston & P. R. Co.*, 10 Metc. (Mass.) 472, 43 Am. Dec. 444; *South, etc., Alabama*

R. Co. v. Wood, 66 Ala. 167, 41 Am. Rep. 749. See § 29, *infra*.

23. *Witbeck v. Holland*, 45 N. Y. 13, 6 Am. Rep. 23; *Baum v. Long Island R. Co.*, 58 Misc. (N. Y.) 34, 108 N. Y. Supp. 1113, until personal delivery is made they are liable as carriers, unless a reasonable excuse for non-delivery exists.

24. *State v. Adams Express Co.*, 171 Ind. 138, 85 N. E. 337, 966, 19 L. R. A. (N. S.) 93.

ordinary undertaking of an express company is to transport the goods to the place of destination, and there deliver them to the consignee at his residence or place of business, if he can be found by reasonable diligence, at the place where they are addressed, or to some person authorized to receive them, and it is liable as a common carrier and insurer thereof until it has carried out this undertaking.²⁵ Its duty is not performed, nor is its liability changed from that of carrier to warehouseman, by giving notice to the consignee that a package addressed to him has arrived and awaits his order. In this respect the obligation of an express company differs from that of a railroad company or steamboat owner; these being allowed to deposit the parcel in their warehouse, and notify the consignee to call for it. A consignee of a package sent by express is not bound to call for it, but the express agent must make reasonable inquiry to find him, and must deliver the package to him.²⁶ Where an express company, after diligent inquiry, cannot find the place of residence of the consignee, its liability as a carrier is then at an end.²⁷ It is the duty of an

25. Ill. — *American Merchants' Union Exp. Co. v. Wolf*, 79 Ill. 430; *American Exp. Co. v. Haggard*, 37 Ill. 465, 87 Am. Dec. 257; *American Exp. Co. v. Baldwin*, 26 Ill. (16 Peck) 504, 79 Am. Dec. 389; *Baldwin v. American Exp. Co.*, 23 Ill. (13 Peck) 197, 74 Am. Dec. 190.

N. Y.—*Witbeck v. Holland*, 55 Barb. (N. Y.) 443, 38 How. Pr. (N. Y.) 273, affd. 45 N. Y. 13, 6 Am. Rep. 23. It seems that a delivery by an express company, at its office, to the authorized agent of the consignee is sufficient. *Sweet v. Barney*, 23 N. Y. 335, affg. 24 Barb. (N. Y.) 533.

Pa.—*American Union Exp. Co. v. Robinson*, 72 Pa. St. (22 P. F. Smith) 274.

W. Va.—*Hutchinson v. United States Exp. Co.*, 63 W. Va. 128, 59 S. E. 944, 14 L. R. A. (N. S.) 393.

Time of delivery.—It is the duty of

an express company, as a common carrier, to deliver goods or packages as soon as practicable after arrival at the place of consignment, within the usual hours of transacting general business in such place. *Marshall v. American Exp. Co.*, 7 Wis. 1, 73 Am. Dec. 381.

Upper floor delivery.—Where the consignee's place of business is on the upper floor of a building, delivery cannot properly be made to him by the carrier by leaving the goods on the ground floor and notifying the office boy of the consignee, who was not authorized to receive packages, of the fact. *Haslam v. Adams Express Co.*, 19 N. Y. Super Ct. (6 Bosw.) 235.

26. *Witbeck v. Holland*, *supra*.

27. *American Exp. Co. v. Hockett*, 30 Ind. 250, 95 Am. Dec. 691.

express company to make personal delivery of packages, except where the place is so small as not to justify the employment of messengers, or the consignee does not reside within a reasonable distance of the office, and then prompt notice must be sent.²⁸ While courts have treated carriers by express as analogous to carriers by wagon, and held that, except at small stations, it is the implication of their undertaking that they will make personal delivery, express companies have the common law right to fix their tolls with reasonable reference to the service rendered, and may fix reasonable delivery limits in towns and cities.²⁹ The rule as to place and mode of delivery of express packages may be modified by special agreement or usage under which delivery may be made at the express office or in the offices of other business places, and the duty of the carrier is then measured by the usage or the terms of the special agreement.³⁰ An express carrier's duty to deliver to the consignee in person, and the consignee's duty to receive are reciprocal. The consignee cannot, by design, or to promote his convenience, deprive the carrier of the right to terminate by delivery the liability as insurer within a reasonable time. Where the consignee has notice of the arrival, and the carrier is ready to deliver, but is prevented by the consignee's absence, the liability as carrier ends, and thenceforward the liability is for reasonable care.³¹ An express company's liability as a carrier continues until delivery of the shipment to the consignee, personally or at his

28. *American Standard Jewelry Co. v. Witherington*, 81 Ark. 134, 98 S. W. 695.

29. *State v. Adams Express Co.*, 171 Ind. 138, 85 N. E. 337, 966, 19 L. R. A. (N. S.) 93; *Bullard v. American Exp. Co.*, 107 Mich. 695, 65 N. W. 551, 61 Am. St. Rep. 358, 33 L. R. A. 66, and they are not liable for refusing to call for or deliver packages outside of such established limits to persons knowing of such limits.

30.—*Hutchinson v. United States Express Co.*, 63 W. Va. 128, 59 S. E. 949, 14 L. R. A. (N. S.) 393; *Sulli-*

van v. Thompson, 99 Mass. 259; *Southern Exp. Co. v. Holland*, 109 Ala. 362, 19 So. 66.

Depositing goods on the platform of the railroad depot at the place of destination, without delivering them to the consignee, or placing them in the custody of any person, is not a sufficient delivery, although the express company had no agent at the place of destination. *Southern Exp. Co. v. Armstead*, 50 Ala. 350.

31. *Adams Exp. Co. v. Darnell*, 31 Ind. 20, 99 Am. Dec. 582.

residence or place of business.³² Liability as a carrier for a package carried to a point at which the established practice is to make delivery at the express office on application for the goods pursuant to notice by mail does not terminate until a reasonable time allowed for removal after notice has elapsed.³³

§ 29. Same subject.—Carriers by rail.

The common law rule that in the absence of a special contract or usage to the contrary, common carriers by land are bound to deliver or tender goods to the consignee at his residence or place of business, has been applied only in exceptional cases to railroads, which are, as general rule, exempt from the duty of personal delivery, and are bound only to carry the goods to the depot or station to which they are destined, and there hold or place them in a warehouse ready for delivery on demand of the consignee or owner whenever called for, after notifying him of their readiness to deliver.³⁴ If a railway company, receiving goods for transportation over its road, exacts the payment of cartage in advance

32. *State v. Parshley*, 108 Me. 410, 81 Atl. 484.

33. *Hutchinson v. United States Express Co.*, 63 W. Va. 128, 59 S. E. 949.

Leaving an express package in the freight room of a railway station at which the express office is maintained instead of in the room in which such packages are usually placed, neither continues the liability of the express company as carrier nor amounts to negligence as warehouseman. *Id.*

34. *Ala.*—*South, etc., Alabama R. Co. v. Wood*, 66 Ala. 167, 41 Am. Rep. 749, 9 Am. & Eng. R. Cas. 419.

Ill.—*Illinois Cent. R. Co. v. Friend*, 64 Ill. 303.

Ind.—*Bansemmer, Toledo, etc., R. Co.*, 25 Ind. 434, 87 Am. Dec. 367.

Iowa.—*Francis v. Dubuque, etc., R. Co.*, 25 Iowa 60, 95 Am. Dec. 769.

Mich.—*Michigan Cent. R. Co. v. Ward*, 2 Mich. 538.

Miss.—*New Orleans, etc., R. Co. v. Tyson*, 46 Miss. 729, 1 Am. Ry. Rep. 474.

Mo.—*Buddy v. Wabash, etc., R. Co.*, 20 Mo. App. 206.

Neb.—*State v. Republican Valley R. Co.*, 17 Neb. 647, 52 Am. Rep. 424, 22 Am. & Eng. R. Cas. 500.

N. Y.—*Witbeck v. Holland*, 45 N. Y. 13, 6 Am. Rep. 23; *Fenner v. Bufalo, etc., R. Co.*, 44 N. Y. 505, 4 Am. Rep. 709; *Baum v. Long Island R. Co.*, 58 Misc. (N. Y.) 34, 108 N. Y. Supp. 1113.

N. C.—*Chalk v. Charlotte, etc., R. Co.*, 85 N. C. 423, 9 Am. & Eng. R. Cas. 108.

U. S.—*Atchison, etc., R. Co. v. Interstate Commerce Commission*, 188 Fed. 229.

Eng.—*Evershed v. London, etc., R. Co.*, 2 Q. B. Div. 254, 26 W. R. 102, 46 L. J. Q. B. Div. 289.

Where a part of goods shipped were

of shipping, from its freight house to the consignee's place of business, in addition to the usual freight for transportation, this will constitute an express contract to deliver at the consignee's place of business.³⁵ The rule of railroad's liability, relaxed from the common law, and substituting a delivery at a safe depot for personal delivery, is applicable to a corporation of freighters owning a line of freight cars and known as a transportation company.³⁶ In all cases where a special contract or usage is shown to exist which relieves the carrier from personal delivery, unless the provisions of the contract are unreasonable, the carrier is not liable if delivery be made in accordance with such special contract or usage.³⁷

destroyed, and the remainder arrived uninjured, the carrier, in order to avoid liability for the entire amount of the goods shipped, is not bound to make, nor offer to make, a personal delivery of the property to the consignee. *Michigan S., etc., R. Co. v. Bivens*, 13 Ind. 263.

Delivery of goods by merely placing them upon the banks of a river, in the absence of the consignee, and not under the care of the agents of the carrier, it having agents at the point for the purpose of receiving and delivering goods, is negligence in a common carrier, in the absence of any special contract. *Dresbach v. California Pac. R. Co.*, 57 Cal. 462.

35. *Ill.*—*Cahn v. Michigan Cent. R. Co.*, 71 Ill. 96.

Md.—*Baltimore, etc., R. Co. v. Green*, 25 Md. 72.

Mo.—*Loomis v. Wabash, etc., R. Co.*, 17 Mo. App. 340. See also *New York Cent., etc., R. Co. v. Standard Oil Co.*, 87 N. Y. 486, 6 Am. & Eng. R. Cas. 353, aff'g 20 Hun (N. Y.) 39, where the contract was held to require the railroad company to unload oil from the barges at the oil company's warehouse.

So where it is the usual custom of a carrier, or the usual and known course of business of the carrier to deliver goods, or particular classes of goods, at the residence or place of business of the consignee, the carrier is bound to make actual delivery at such place. *Taff Vale R. Co. v. Giles*, 2 El. & Bl. 822, 88 E. C. L. 822; *Golden v. Manning*, 2 W. Bl. 916; *Mitchell v. Lancashire, etc., R. Co.*, L. R. 10 Q. B. 256, 44 L. J. Q. B. 107; *Wise v. Great Western R. Co.*, 1 H. & N. 63, 25 L. J. Exch. 258; *Bourne v. Gatliff*, 11 Cl. & F. 45, 33 E. C. L. 364.

36. *Merchants' Dispatch Transp. Co. v. Hallock*, 64 Ill. 284.

A stipulation that goods should be forwarded to "Louisville depot only," contained in a bill of lading, is sufficient to relieve the common carrier from making a personal delivery to the consignee at his residence or place of business. *Merchants' Dispatch Transp. Co.*, 111 Ind. 5, 11 N. W. 954.

37. *Matter of Webb*, 8 Taunt. 443, 4 E. C. L. 159; *Richardson v. Goss*, 3 B. & P. 119; *Strong v. Nataly*, 1 B. & P. N. R. 16.

§ 30. Delivery by carriers by water.

Carriers by water are not held to a personal delivery of the goods to the consignee or to a delivery at any other place than at the wharf or usual place of unloading of the vessel, and notice to the consignee of the arrival of the goods, and of a readiness to deliver, takes the place of a personal delivery, so far as to release the carrier from the extraordinary and stringent liabilities incident to that class of bailees. By the general usages of commercial or maritime law, as established by judicial decisions, it is well settled that the carrier by water shall carry from port to port or from wharf to wharf, and that it is the duty of the carrier to deliver, and of the consignee to receive the goods, out of the ship or on the wharf.³⁸ The landing of goods upon a wharf is not a delivery. To constitute a valid delivery on the wharf, the carrier is bound to give due and reasonable notice to the consignee of such landing, so as to afford him a fair opportunity of providing suitable means to remove the goods or put them under proper care and custody, and it remains liable as an insurer of the safety of the goods until after the lapse of a reasonable time from the giving of such notice, and is bound to store the goods in a safe and suit-

33. Ind.—Bansemer v. Toledo, etc., R. Co., 25 Ind. 434, 87 Am. Dec. 367.

Ill.—Union Steamboat Co. v. Knapp, 73 Ill. 506.

La.—Kohn v. Packard, 3 La. 224, 23 Am. Dec. 453.

Mass.—Chickering v. Fowler, 21 Mass. (4 Pick.) 371.

N. Y.—Kilroy v. Delaware, etc., Canal Co., 121 N. Y. 22, 24 N. E. 122; McAndrew v. Whitlock, 52 N. Y. 40, 11 Am. Rep. 657; Zinn v. New Jersey Steamboat Co., 49 N. Y. 442, 10 Am. Rep. 402, 3 Am. Ry. Rep. 340; Redmond v. Liverpool, etc., S. S. Co., 56 Barb. (N. Y.) 320; Van Santvoord v. St. John, 6 Hill (N. Y.) 157; Davis v. Chautauqua Lake, etc., Assembly, 41 Hun (N. Y.) 638, 2 N. Y. St. Rep. 365.

Pa.—Cope v. Cordova, 1 Rawle (Pa.) 203; Scott v. Province, 1 Pittsb. R. (Pa.) 19.

Vt.—Farmers', etc., Bank v. Champlain Transp. Co., 16 Vt. 52, 42 Am. Dec. 491, 23 Vt. 186, 56 Am. Dec. 68.

U. S.—The Grafton, Olcott (U. S.) 43, 10 Fed. Cas. No. 5,656; Richardson v. Goddard, 23 How. (U. S.) 48; The Eddy, 5 Wall. (U. S.) 481.

Eng.—Hyde v. Trent. Nav. Co., 5 T. R. 68.

The responsibility of a carrier upon the Ohio River does not cease upon the delivering of the goods on the wharf, and notice given to the consignee, but it is its duty to attend to the actual delivery. *Hemphill v. Chenie*, 6 Watts & S. (Pa. 1843) 62.

able warehouse to await the consignee or his agent.³⁹ If the carrier fail to give such notice, or if a reasonable and diligent effort is not made to find and notify the consignee, the carrier is liable for the consequences of such neglect and for any depreciation in the value of the goods from their value at the time and place they ought to have been delivered and their value at the time of their actual delivery.⁴⁰

39. *Ostrander v. Brown*, 15 Johns. (N. Y.) 39, 8 Am. Dec. 211; *Rowland v. Miln*, 2 Hilt. (N. Y.) 150; *Pickering v. Weld*, 159 Mass. 522; *Blin v. Mayo*, 10 Vt. 56, 33 Am. Dec. 175; *Sleade v. Payne*, 14 La. Ann. 457; *Hemphill v. Chenie*, 6 W. & S. (Pa.) 62; *Warner v. The Illinois*, 17 Phila. (Pa.) 549; *Galloway v. Hughes*, 1 Bayley L. (S. C.) 553; *Morgan v. Dibble*, 29 Tex. 107, 94 Am. Dec. 264; *Shenk v. Philadelphia Steam, etc., Co.*, 60 Pa. St. 109, 100 Am. Dec. 541.

The rule of the text may be varied by contract, or affected by well established, reasonable, and generally known local custom and usage of such uniformity, certainty, and notoriety as to warrant the jury in finding that it was known to the party sought to be affected. *Huston v. Peters*, 1 Metc. (Ky.) 558; *Gashweiler v. Wabash, etc., R. Co.*, 83 Mo. 112, 53 Am. Rep. 558, 25 Am. & Eng. R. Cas. 403.

A delivery of goods consigned to certain warehousemen, at the pier instead of the warehouse to which they were consigned, is not delivery according to the carrier's contract. *Steamboat Sultan v. Chapman*, 5 Wis. 454.

A delivery of goods consigned to a party at a particular landing, where there had been a warehousekeeper, at the usual place on the river bank, without any protection or guard,

when the landing had been broken up by an inundation, and the washing away of the buildings, and the removal of the persons in charge, is not a good delivery. *Stone v. Rice*, 58 Ala. 95. Where it is in accordance with the local custom recognized by merchants and others, a carrier may notify a consignee of the arrival of the goods by postal card deposited in the mails. *Roth Clothing Co. v. Maine Steamship Co.*, 44 Misc. Rep. (N. Y.) 237, 88 N. Y. Supp. 987; *Friedman v. Metropolitan S. S. Co.*, 45 Misc. Rep. (N. Y.) 383, 90 N. Y. Supp. 401; *Normile v. Northern Pac. Ry. Co.*, 36 Wash. 21, 77 Pac. 1087, 67 L. R. A. 271.

40. *Sherman v. Hudson River R. Co.*, 64 N. Y. 254; *Zinn v. New Jersey Steamboat Co.*, 49 N. Y. 442, 3 Am. Ry. Rep. 340, 10 Am. Rep. 402.

The carrier is not responsible for injury to the goods due to the fault of the consignee. *Goodwin v. Baltimore, etc., R. Co.*, 50 N. Y. 154, 10 Am. Rep. 457; *The Mill Boy*, 4 McCrary (U. S.) 383.

Personal notice may be excused where there are certain provisions in the bill of lading. *Constable v. National Steamship Co.*, 154 U. S. 51, 14 Supp. Ct. 1062, 38 L. Ed. 903.

What is a sufficient delivery, by carrier to consignee, of unusually bulky articles, such as a raft of logs. *Hungerford v. Winnebago Tug Boat, etc., Co.*, 33 Wis. 303.

§ 31. Delivery where consignee refuses to receive.

When goods are safely conveyed to the place of destination, and the consignee does not accept or refuses to receive the goods, the carrier may discharge itself from further responsibility, except as warehouseman, by storing the goods in its warehouse, or in that of some responsible third party, and the goods are then subject to its lien for storage as well as transportation charges.⁴¹ After notice sent to the consignor or owner and the goods being held in storage for a reasonable length of time, if the consignee still refuses to receive the goods, the lien may be enforced as provided by law, and the carrier will be discharged from further liability upon accounting for the proceeds.⁴² If the goods are of a perishable nature and it becomes a matter of necessity to sell to prevent a total loss, the carrier may sell them, after giving reasonable notice of the time and place of sale, and retain its freight and charges from the proceeds. The sale in such case is not in virtue of its lien, but in the interest of the owner.⁴³ In order to relieve itself from liability, the carrier must deliver the goods in good condition, and is not justified in abandoning them or negligently ex-

41. *McAndrew v. Whitlock*, 52 N. Y. 40, 11 Am. Rep. 657; *Redmond v. Liverpool, etc., R. Co.*, 46 N. Y. 578, 7 Am. Rep. 390; *Cook v. Erie R. Co.*, 58 Barb. (N. Y.) 312; *Rowland v. Miln*, 2 Hilt. (N. Y.) 150; *Williams v. Holland*, 22 How. Pr. (N. Y.) 137; *Fisk v. Newton*, 1 Den. (N. Y.) 47, 43 Am. Dec. 649; *American Sugar, etc., Co. v. McGhee*, 96 Ga. 27; *Illinois Cent. R. Co. v. Cobb*, 64 Ill. 128; *Gulliver v. Adams Express Co.*, 38 Ill. 502; *Bartholomew v. St. Louis, etc., R. Co.*, 53 Ill. 227, 5 Am. Rep. 45; *Cassilay v. Young*, 4 B. Mon. (Ky.) 265 39 Am. Dec. 505; *Young v. Smith*, 3 Dana (Ky.) 91, 28 Am. Dec. 57; *Wood v. Crocker*, 18 Wis. 345, 80 Am. Dec. 773; *Steamboat Keystone v. Moies*, 28 Mo. 243, 75 Am. Dec. 123; *Lesinsky v. Great Western Dispatch*, 13 Mo. App. 575; *Crouch v.*

Great Western R. Co., 2 H. & N. 491, 3 Jur. N. S. 796; *Great Western R. Co. v. Crouch*, 3 H. & N. 183, 4 Jur. N. S. 457; *Great Northern R. Co. v. Swaffield*, L. R. 9 Exch. 132, 43 L. J. Exch. 89.

42. *Cassily v. Young*, 4 B. Mon. (Ky.) 265; 39 Am. Dec. 505; *Rankin v. Memphis, etc., Packet Co.*, 9 Heisk. (Tenn.) 569, 24 Am. Rep. 339. Proof of demand and tender of charges are not necessary to sustain an action by a shipper against an express company for failure to return goods as directed, upon refusal of the consignee to accept them. *Hirsch v. Platt*, 89 N. Y. Supp. 362.

43. *Rankin v. Memphis, etc., Packet Co.*, 9 Heisk. (Tenn.) 568, 24 Am. Rep. 339; *Arthur v. The Schooner Cassius*, 2 Story (U. S.) 97. See Enforcement of lien, § 12, chap. 16.

posing them to injury, even if the consignee neglects or refuses to accept or receive them after notice of their arrival.⁴⁴ A failure by the carrier to deliver goods within reasonable time constitutes a conversion and entitles the consignee to recover their full value, when the delay destroys the value of the goods entirely or renders them valueless to the consignee.⁴⁵ But otherwise such delay in delivery is merely a breach of contract, and not conversion, and the consignee cannot refuse to accept the goods and recover their full value.⁴⁶ The consignee is not warranted in refusing to receive goods on account of damage or depreciation in value resulting from delay in delivery, but, upon notice of their arrival, should receive the goods and dispose of them to the best advantage, and the measure of damages he is entitled to recover will be the difference between the amount he would have realized if prompt delivery had been made and the amount actually realized. He is entitled to recover only to the extent of the actual injury.⁴⁷ The

44. *Scheu v. Benedict*, 116 N. Y. 510, 15 Am. St. Rep. 426. Where the carrier was in no way at fault, and notice was given to the consignor of the consignee's refusal to receive the goods because they were not such as he ordered, the carrier is not liable to the consignor. *Adams Express Co. v. McConnell*, 27 Kan. 238, 9 Am. & Eng. R. Cas. 240.

As to goods offered for delivery in a damaged and perishing condition from causes for which the carrier was not responsible, and which are refused by the consignee, after reasonable notice and opportunity to remove given to the consignee, the carrier becomes a compulsory bailee bound only to the reasonable care of an involuntary custodian. *The Bobolink*, 6 Sawy. (U. S.) 146.

As to the cars of a connecting line in which goods are tendered for delivery the carrier, upon refusal of the consignee to receive, becomes liable only as warehouseman, no negligence

being shown. *Missouri Pac. R. Co. v. Chicago, etc., R. Co.*, 25 Fed. 317, 23 Am. & Eng. R. Cas. 718.

45. *Mitchell v. Weir*, 19 App. Div. (N. Y.) 183, 45 N. Y. Supp. 1085.

46. *Ostrander v. Brown*, 15 Johns. (N. Y.) 39, 8 Am. Dec. 211; *Shaw v. South Carolina R. Co.*, 5 Rich. L. (S. C.) 462, 57 Am. Dec. 768; *Galveston, etc., R. Co. v. Watson*, 1 Tex. Civ. App. Cas., § 813; *Baumbach v. Gulf, etc., R. Co.*, 4 Tex. Civ. App. 650.

47. *Mills v. National Steamship Co.*, 5 N. Y. Supp. 258; *Adams Express Co. v. McDonough*, 6 Ohio Cir. Ct. Rep. 539; *New Orleans, etc., R. Co. v. Tyson*, 46 Miss. 729, 1 Am. Ry. Rep. 474; *Howe v. Oswego, etc., R. Co.*, 56 Barb. (N. Y.) 121; *Nettles v. South Carolina R. Co.*, 7 Rich. L. (S. C.) 190, 62 Am. Dec. 409.

The receipt of goods damaged, but yet of some value, will not be regarded as a waiver of claim for damages, and failure to receive such goods within a reasonable time will entitle

signee will relieve the carrier from liability for any consequences as to amount to practically a total loss.⁴⁸ If they are so damaged as to be unsafe for removal from the station, and the carrier fail to repair, if they are capable of repair, acceptance cannot be required of the consignee.⁴⁹ And in either case, full value of the goods may be recovered.⁵⁰ Where goods are tendered for delivery at an unreasonable time or place, or under unreasonable conditions, the consignee may refuse to accept under such circumstances, and his right to insist upon a subsequent delivery and the carrier's duty to care for the goods meanwhile will not be affected by his refusal.⁵¹ So, he may demand the delivery of goods, after once refusing to receive them when duly tendered, where his refusal was due to mistake, and no other rights have intervened.⁵²

§ 32. Delivery of goods sent C. O. D.

Where goods are sent with instructions not to deliver them until they are paid for, the carrier, who accepts the goods with such instructions, undertakes not to deliver them unless the condition of payment is complied with. In addition to its obligations as a carrier, it becomes the agent of the consignor to collect and receive the price of the goods and return the money to the consignor.

the carrier to offset a claim for storage against the consignee's claim for damage. *Gulf, etc., R. Co. v. Boston*, 4 Tex. Civ. App. Cas., § 66; *Galveston, etc., R. Co. v. Van Winkle*, 3 Tex. Civ. App. Cas., § 442.

A snortage of goods does not justify a refusal to accept, and if they are sold for freight and storage charges, the consignee has no right of action. *Id.*

The consignee is not bound to accept where only a third of the goods are tendered and there is no evidence that they are the original goods shipped. *Chicago, etc., R. Co. v. Warren*, 16 Ill. 502, 63 Am. Dec. 317.

Where only a part of the goods are damaged, the consignee cannot refuse to receive the portion uninjured, and hold the carrier liable for the entire

shipment. *Michigan Southern, etc., R. Co. v. Bivens*, 13 Ind. 263.

48. *Thomas, etc., Mfg. Co. v. Wabash, etc., R. Co.*, 62 Wis. 642, 51 Am. Rep. 725; *Texas, etc., R. Co. v. Logan*, 3 Tex. Civ. App. Cas., § 185; *Gulf, etc., R. Co. v. Maetz*, 2 Tex. Civ. App. Cas., § 630, 18 Am. & Eng. R. Cas. 613.

49. *Breed v. Mitchell*, 48 Ga. 533.

50. See notes 48 and 49.

51. *Eagle v. White*, 6 Whart. (Pa.) 505, 37 Am. Dec. 434; *Hill v. Humphreys*, 5 W. & S. (Pa.) 123, 39 Am. Dec. 117; *Texas, etc., R. Co. v. Martin*, 2 Tex. Civ. App. Cas., § 341.

52. *Bacharach v. Chester Freight Line*, 133 Pa. St. 414, 42 Am. & Eng. R. Cas. 362; *Edwards v. Cheraw, etc., R. Co.*, 32 S. C. 117, 42 Am. & Eng. R. Cas. 453.

This obligation or duty is not one arising or implied from the nature of its business, but is based upon contract, express or implied.⁵³ If the carrier accepts goods with such instructions, or if goods are so clearly marked as to show the intention of the consignor to make payment a condition of delivery, a contract is implied, and delivery under such circumstances without requiring payment, though to the consignee or to the right person, is a conversion, and the carrier is liable therefor to the consignor.⁵⁴ The

53. *Danciger v. Wells, Fargo Co.*, 154 Fed. 379 (U. S. C. C., Mo.), and the carrier may refuse to make such contract in any particular case, notwithstanding any custom or usage it may have established or followed, which cannot enlarge its legal duty as a carrier; *American Express Co. v. Lesem*, 39 Ill. 312; *Cox v. Columbus, etc., R. Co.*, 91 Ala. 392, 8 So. 824, 49 Am. & Eng. R. Cas. 112; *American Merchants', etc., Co. v. Wolfe*, 97 Ill. 430.

Undertaking to collect charges.—When a bill of lading, by fair construction, requires the carrier to collect charges upon the goods on delivery, if the carrier delivers the goods without collecting the sum due, he becomes liable therefor. *Meyer v. Lemcke*, 31 Ind. 208.

By simply marking package C. O. D., a consignor cannot charge a common carrier with any duty of collecting from the consignee the price or other charge against goods transmitted by the carrier. There must be some undertaking by the carrier to collect; either directly proved, or inferable from a usage. *Chicago, etc., R. Co. v. Merrill*, 48 Ill. 425.

Agent acting without authority.—To an action against a carrier for delivery, without payment of the price, of goods alleged to have been

deliverable, by the bills of lading to the order of the plaintiff, who indorsed and delivered the bills to the carrier, with the agreement that upon payment of the price they were to be delivered to a third person, it is a good defense that the agreement was made with the carrier's agent, and that he acted beyond his authority, and as plaintiff's agent in delivering the goods, and not as the carrier's agent. *Cox v. Columbus, etc., R. Co.*, 91 Ala. 392, 49 Am. & Eng. R. Cas. 112, 8 So. 824.

54. *Tooker v. Gormer*, 2 Hilt. (N. Y.) 71; *Feiber v. Manhattan Dist. Tel. Co.*, 3 N. Y. Supp. 116, 4 N. Y. Supp. 555; *Murray v. Warner*, 55 N. H. 546, 20 Am. Rep. 227; *Hutchings v. Ladd*, 16 Mich. 493; *Jellett v. St. Paul, etc., R. Co.*, 30 Minn. 265, 16 Am. & Eng. R. Cas. 246; *American Express Co. v. Lesem*, 39 Ill. 312; *American, etc., Express Co. v. Schier*, 55 Ill. 140; *Cox v. Columbus, etc., R. Co.*, 91 Ala. 392, 8 So. 824, 49 Am. & Eng. R. Cas. 112; *Lane v. Chadwick*, 146 Mass. 68, a consignee cannot maintain replevin against the carrier before payment and delivery. See also *Old Colony R. Co. v. Wilder*, 137 Mass. 536, 21 Am. & Eng. R. Cas. 41.

Where a carrier by whom goods sold are shipped to be delivered to the vendee upon the payment of the

letters "C. O. D.," followed by an amount in dollars, marked upon the goods consigned for shipment, are well understood by the public to mean that the carrier accepting the goods for transportation shall collect the amount stated as a condition precedent to delivery;⁵⁵ but their meaning may not be considered as judicially settled, or so well understood that judicial notice can be taken of the purpose for which they are used in all cases, or of the contract to be implied from them, although it is competent to explain them, and thus remove all ambiguity, by parol evidence.⁵⁶ In some jurisdictions, however, it has been held that these letters have acquired a fixed and determinate meaning, which courts and juries will recognize from their general information, and that they import the carrier's liability to return to the consignor either the goods or the charges.⁵⁷ Sending a bill of goods for collection,

purchase money negligently delivers the goods before such payment, neither the carrier nor the vendor can recover the goods from a bona fide purchaser from the vendee. *Norfolk Southern R. Co. v. Barnes*, 104 N. C. 25, 10 S. E. 83, 40 Am. & Eng. R. Cas. 121, 5 L. R. A. 611.

Where there is a verbal agreement as to delivery in addition to the shipper's receipt the contract of bailment must be ascertained by the jury from both the receipt and the verbal agreement. *Union R. etc., Co. v. Riegel*, 73 Pa. St. 72.

Where goods are sent over several connecting lines, the obligation as to the collection of the price, imposed by the acceptance of goods marked C. O. D., rests on the last carrier, and the other carrier cannot be made responsible for its default. *Rennie v. Northern R. Co.*, 27 U. C. C. P. 153.

55. *Collender v. Dinsmore*, 55 N. Y. 205, 14 Am. Rep. 224. The letters C. O. D. placed upon a package shipped by express, means that the value or price of the package will be collected on delivery and trans-

mitted to the consignor. Those letters have nothing to do with the transportation charges. *American, etc., Exp. Co. v. Schier*, 55 Ill. 140; *American Exp. Co. v. Lesem*, 39 Ill. 312.

56. *Collender v. Dinsmore*, 55 N. Y. 205, 14 Am. Rep. 224. The court will not take judicial notice of the meaning of "C. O. D." Its meaning is a question for the jury. *McNichol v. Pacific Express Co.*, 12 Mo. App. 401. See also, *American Merchants, etc., Co. v. Wolfe*, 79 Ill. 430; *American Express Co. v. Lesem*, 39 Ill. 312.

57. *United States Express Co. v. Kefer*, 59 Ind. 263, the rule applied where the goods had been destroyed by the burning of the depot; *State v. Intoxicating Liquors*, 73 Me. 278, courts and juries, from their general information, may take the initials, "C. O. D.," when affixed to packages sent by common carriers from seller to buyer, to mean that delivery is to be made upon payment of the charges due the seller for the price, and the carrier for the carriage, of the goods.

or with a request to collect, does not create an undertaking on the part of the carrier not to deliver until the goods are paid for.⁵⁸ An express company is not liable for failure to collect on delivery of a package sent to it for carriage with instructions so to collect, where the receipt given therefor was, to the knowledge of the sender, that used for ordinary packages, upon which only express charges are collected.⁵⁹ After the carrier has tendered a package sent C. O. D. to the consignee and demanded the money, and after the consignee has had a reasonable time to call for and receive it, the carrier holds the package as warehouseman and not as a common carrier, and is thereafter responsible for the care of a warehouseman merely.⁶⁰ If the consignee refuses to receive and pay for the goods, or is unknown or cannot be found, the liability of the carrier becomes that of a warehouseman, but it should notify the consignor and hold the goods for further instructions, or subject to the consignor's order.⁶¹ The acceptance by the carrier of the consignee's check, payable to the order of the consignor, for the amount to be collected, which the consignor accepts without objection, relieves the carrier from liability, even though the drawer had no funds in the bank when the check was drawn.⁶² So, the taking of the consignee's acceptance of a draft drawn

58. *Tooker v. Gormer*, 2 Hilt. (N. Y.) 71; *Wells v. American Express Co.*, 44 Wis. 342.

59. *Smith v. Southern Express Co.*, 104 Ala. 387, 61 Am. & Eng. R. Cas. 168.

60. *Weed v. Barney*, 45 N. Y. 344, 6 Am. Rep. 96; *Zinn v. New Jersey Steamboat Co.*, 49 N. Y. 442; *Gibson v. American, etc., Express Co.*, 1 Hun (N. Y.) 387; *Marshall v. American Express Co.*, 7 Wis. 1, 73 Am. Dec. 381; *Adams Express Co. v. Darnell*, 31 Ind. 20; *Storr v. Crowley*, 1 McClell. & Y. 129. So where the carrier has limited his liability to that of a warehouseman for goods while they are waiting to be called for. *Pacific Express Co. v. Wallace*, 60 Ark. 100, 61 Am. & Eng. R. Cas. 170, 29 S. W. 32.

61. *Hasse v. American Express Co.*, 94 Mich. 153, 53 N. W. 918, 47 Alb. L. J. 25; *American Express Co. v. Greenhalge*, 80 Ill. 68; *American, etc., Express Co. v. Wolfe*, 79 Ill. 430.

62. *Rathbun v. Citizens Steamboat Co.*, 76 N. Y. 376, 32 Am. Rep. 321, 57 How. Pr. (N. Y.) 191. Compare *Walker v. Walker*, 5 Heisk. (Tenn.) 425.

The power of a factor to waive collection.—Where a commercial agent has sold goods on credit, which are forwarded by his principal by express, and marked "C. O. D.," the expressman having no notice of any limitation of the agent's authority, may, upon the order of the agent, deliver the goods without payment of the price. *Daylight Burner Co. v. Odlin*, 51 N. H. 56, 12 Am. Rep. 45.

against the shipment, after the consignor knew that the goods had been delivered without production of the bill of lading, and that his intention to prevent a delivery of the goods until payment of the purchase price had been thereby defeated, will operate as a waiver of the consignor's right of action against the carrier for conversion for such delivery.⁶³ Where goods, in the usual course of business, are shipped on freight, to be sold by the owner of the vessel for a certain freight, or are consigned to the master for sale and returns, the owner of the vessel is liable, as well for the payment of the proceeds to the shipper, as for the safe carriage of the goods.⁶⁴ This is held to be the rule, although no special compensation beyond the freight, is allowed for the sale of the goods and the return of the money.⁶⁵ The carrier is not liable where the consignee retains a part of the goods and returns the others, paying for those retained, which amount and the goods not accepted are returned to the consignor,⁶⁶ and where the carrier collects only part of the amount due, but remits all that is collected, such payment must be applied by the consignor to that particular shipment so as to relieve the carrier.⁶⁷ The consignee is entitled to a reasonable time in which to call for the goods and pay the amount due, and the carrier is liable in damages for returning the goods to the consignor without allowing a reasonable time for payment to the consignee.⁶⁸ The consignee has the right to a reasonable opportunity to examine the goods before accepting them, and a delivery to the consignee for the purpose of inspection, even though he pay the price conditioned upon its return to him if the goods on

63. *Southern R. Co. v. Kinchen*, 103 Ga. 186, 29 S. E. 816.

64. *Emery v. Hersey*, 4 Greenl. (Me.) 407, 16 Am. Dec. 268; *S. P. Moseley v. Lord*, 2 Conn. 389; *Harrington v. McShane*, 2 Watts (Pa.) 443, 27 Am. Dec. 321, where the boat was accidentally burned on her return, with the money received on the sale of goods; *Taylor v. Wells*, 3 Watts (Pa.) 65, where the captain failed to account for the proceeds the owner was held not answerable without proof that he had given express

authority to the captain to act as a factor, or that he had implied authority by the usage of trade; *Zolinger v. Steamer Emma*, 3 Cent. L. J. 285.

65. *Kemp v. Coughtry*, 11 Johns. (N. Y.) 107.

66. *Feiber v. Manhattan Dist. Tel. Co.*, 3 N. Y. Supp. 116, 4 N. Y. Supp. 555.

67. *American Express Co. v. Lesem*, 39 Ill. 312.

68. *Great Western R. Co. v. Crouch*, 3 H. & N. 183.

examination prove unsatisfactory, is not such a delivery as will render the carrier liable to the shipper for the amount directed to be collected on delivery.⁶⁹ If a carrier deliver a package marked "C. O. D." to the consignee, and receive payment, and the transaction turns out to be a fraud, and the package worthless, the consignee may reclaim his money, at any time before the carrier has paid it over to the fraudulent consignor.⁷⁰ The consignee may likewise recover the price paid to the carrier for damaged goods received C. O. D., provided he has notified the carrier within a reasonable time that the goods were worthless and has offered to return the goods to it.⁷¹

§ 33. Confusion of goods.

As a rule the consignee is entitled to the delivery of the identical goods shipped to him, and the carrier is liable for any damages caused by a delivery of other goods, by reason of an admixture or confusion of goods through mistake or otherwise.⁷² The rule is not applied in the case of grain consigned to elevators, and where a warehouseman, without special agreement, but according to cus-

69. *Aaron v. Adams Express Co.*, 27 Ohio L. J. 183; *Lyons v. Hill*, 46 N. H. 49, 88 Am. Dec. 189; *Wilson v. Elliott*, 57 N. H. 316; *Avery v. Stewart*, 2 Conn. 74, 7 Am. Dec. 240; *Isherwood v. Whitmore*, 11 M. & W. 347.

When carrier may refuse inspection.—The agent of an express company may, without rendering the company liable to any action in behalf of the consignee, refuse to permit him to examine the goods until he has paid express charges and accepted delivery; and on his refusal, return the goods to the consignor, if the consignor has specially instructed them to do so, or if the company took charge of the goods subject to a general regulation, known to the consignor, prescribing this course. *Witse v. Barnes*, 46 Iowa, 210.

70. *Herrick v. Gallagher*, 60 Barb. (N. Y.) 566.

71. *Hardy v. American Express Co.*, 182 Mass. 328, 65 N. E. 375, 59 L. R. A. 731.

72. *The Augusta*, 29 Fed. 334, where bales of corkwood shipped in good order were opened for storage, and in rebaling, different sizes and qualities were so mixed as to reduce the market value, and the consignee refused to receipt for them as in good order, and they were sold by the shipowner, it was held that the consignee could receive their sound value less freight; *Rice v. Boston, etc., R. Corp.*, 98 Mass. 212, wherein it was held that the consignee was entitled to recover damages for coal being unloaded by the side of the railroad track without preparing the ground to receive the coal by laying down boards or otherwise, so that the different sorts and sizes of coal were mixed and soil mingled with it.

tom, mixes the grain of several depositors in a common mass, they become tenants in common of the entire amount of like quality, and the carrier may, in accordance with accepted usage, discharge his obligation by delivery of grain of the same grade and kind as was shipped, and for the negligent destruction of the same each depositor can recover the value of his grain.⁷³ Where the con-

Default or negligence of carrier must be shown.—Consignees of iron whose agents assisted in selecting what was delivered, and accepted it as what they were entitled to by their bill of lading, and caused it to be sent away, must show satisfactorily that what was thus accepted was less than should have been delivered, and that their failure to receive all they should have received is attributable to some default on the part of the ship, in order to hold the latter liable for a deficiency, under a bill of lading stating that the vessel is not accountable for the number of pieces or weight. *Eaton v. Neumark*, 37 Fed. 375, affg. 33 Fed. 891. See also, *Milligan v. Grand Trunk R. Co.*, 17 U. C. C. P. 115.

73. *Arthur v. Chicago, etc., R. Co.*, 61 Iowa, 648, 16 Am. & Eng. R. Cas. 285; *Sexton v. Graham*, 53 Iowa 181, where grain is delivered to a warehouseman and a receipt taken which provides that the grain may be stored with other grain of the same quality, the transaction constitutes a bailment and not a sale, even though the warehouseman is continually adding grain on his own account to the common mass, and shipping away therefrom; *Pratt v. Bryant*, 20 Vt. 333, if the owner of goods intentionally intermingle them with goods of the same kind belonging to another person, but through negligence merely, and not wilfully or fraudulently, his property in them is not lost; but his

remedy is not by action of book account, even though his goods may have been used by the owner of the goods with which they were thus intermingled; *Cushing v. Breed*, 14 Allen (Mass.), 376, 92 Am. Dec. 777, where several parties store grain in a grain elevator, and it is put into one mass, according to the usage of the trade, they are tenants in common thereof, and a valid title to a quantity of the grain will pass by a delivery from the vendor to the vendee of an order to deliver such quantity, directed to the owners of the elevator, and accepted by them in the usual manner by retaining the order and entering it on their books, although there is no separation of the quantity sold from the rest of the mass; *Keeler v. Goodwin*, 111 Mass. 490, no title passes on a sale of part of goods lying in bulk until separation, and, on delivery to a carrier for transportation to the buyer, the seller may suspend such inchoate delivery, and revoke the authority of any intermediary to perfect it. See also *Bryant v. Clifford*, 13 Metc. (Mass.) 138; *Wingate v. Smith*, 20 Me. 287; *Stearns v. Raymond*, 26 Wis. 74; *Moore v. Erie R. Co.*, 7 Lans. (N. Y.) 39; *Nowlen v. Colt*, 6 Hill (N. Y.) 461; *Forbes v. Boston, etc., R. Co.*, 133 Mass. 154, 9 Am. & Eng. R. Cas. 80; *Roblin v. Jackson*, 13 Man. R. (Can.) 328. Compare *Stephenson v. Little*, 10 Mich. 433; *Ryder v. Hathaway*, 21 Pick. (Mass.) 298.

signment note and shipping receipt, constituting the contract between the parties, shows that such was the contract and intention of the parties, the consignee is entitled to demand the specific grain shipped and to recover damages for a failure to deliver it.⁷⁴

§ 34. Statutory penalties for refusing to deliver promptly.

A statute to compel railroads to deliver freight promptly on tender of proper charges is a valid exercise of the police power of a State, and not an unlawful attempt to regulate interstate commerce.⁷⁵ A statute providing that, on failure of a railroad company to deliver freight on tender of charges, it shall be liable to the owner to an amount equal to the freight charges for every day of detention, is a remedial and not a penal statute, and not unconstitutional, though providing a civil rather than criminal remedy, and allowing an excess of damages over what could be recovered in an ordinary action, such damages being exemplary.⁷⁶ The general rule is that a State cannot exclude, directly or indirectly, the subjects of interstate commerce, or, by the imposition of burdens thereon, regulate such commerce, without congressional permis-

74. *Leader v. Northern R. Co.*, 3 Ont. Rep. 92, 16 Am. & Eng. R. Cas. 287.

75. *Little Rock, etc., R. Co. v. Hanford*, 49 Ark. 291, 30 Am. & Eng. R. Cas. 67, applying to every member of a class,—to all railroads, for example, it is not special legislation; *Gulf, etc., R. Co. v. Dwyer*, 75 Tex. 572, 7 L. R. A. 478, 7 R. R. & Corp. L. J. 355, 12 S. W. 1001, 42 Am. & Eng. R. Cas. 503; *Dwyer v. Gulf, etc., R. Co.*, *id*; *St. Louis, etc., R. Co. v. McKee*, 4 Tex. App. Civ. Cas. § 7.

76. *Houston, etc., R. Co. v. Harry*, 63 Tex. 256, 18 Am. & Eng. R. Cas. 502. A bill of lading for through shipment of goods to a designated point, "subject to the published tariff of the company and its connections," makes a published local tariff rate for an intermediate point

a part of the contract; and the company cannot, without rendering itself liable for the penalty prescribed by statute for every day's detention, refuse to deliver the goods at such intermediate point on a tender of the local rate, on the ground that the bill of lading is controlled by the through tariff schedule, or on the ground that such tender was made under protest. *Atchison, etc., R. Co. v. Roberts*, 3 Tex. Civ. App. 370, 22 S. W. 183.

A carrier cannot justify an unjust or unreasonable charge by observing the classification and rates of a published schedule, under a statute prohibiting unjust discrimination in charges and the making of unjust and unreasonable charges. *Little Rock, etc., R. Co. v. Bruce*, 55 Ark. 65, 17 S. W. 363.

sion;⁷⁷ but a statute imposing a penalty upon carriers for withholding freight from its consignees has been held not unconstitutional in its application to freight shipped from points without the State.⁷⁸ The penalty provided by such a statute applies only to a company which has itself executed, authorized, or ratified the execution of the bill of lading, and a defendant carrier which refuses to deliver goods on tender of the charges shown by the bill of lading, claiming that it had paid to another carrier the charges shown by the waybill, which exceeded those in the bill of lading, is not liable to the statutory penalty where the evidence shows that the bill was executed by another carrier and had not been ratified by the defendant.⁷⁹ A violation of the statute is not excused by the fact that the plaintiff refused to exhibit or surrender the bill of lading.⁸⁰ But the statute cannot be enforced when it conflicts with the Federal statute, since to enforce the penalty would be punishing for an obedience to the law of Congress, a disobedience of which would constitute a misdemeanor.⁸¹ Such a statute is penal, and one enforcing the penalty must bring himself strictly within its provisions.⁸² The statute does not give validity to

77. *Lyng v. Michigan*, 135 U. S. 161, 34 L. Ed. 150, 3 Inters. Com. Rep. 143, 10 Sup. Ct. Rep. 725; *Baird v. St. Louis, etc.*, R. Co., 41 Fed. 592, 42 Am. & Eng. R. Cas. 281, 7 R. R. & Corp. L. J. 516.

78. *Fort Worth, etc.*, R. Co. v. *Lillard* (Tex. App.), 16 S. W. 654; *Dwyer v. Gulf, etc.*, R. Co., *supra*.

79. *Dwyer v. Gulf, etc.*, R. Co., 75 Tex. 572, 7 L. R. A. 478, 7 R. R. & Corp. L. J. 355, 12 S. W. 1001, 42 Am. & Eng. R. Cas. 503; *Gulf, etc.*, R. Co. v. *Dwyer*, 84 Tex. 194, 19 S. W. 470; *Fordyce v. Johnson*, 56 Ark. 430, 19 S. W. 1050; *Loewenberg v. Arkansas, etc.*, R. Co., 56 Ark. 439, 19 S. W. 1051. This is held to be especially so where the excess is due to misrouting by one of the carriers. *Id.*

A declaration which shows that the

bill of lading was issued by a carrier other than the defendant, is insufficient unless it also avers that the two carriers were partners. *Miller v. Texas, etc.*, R. Co., 83 Tex. 518. See also *Gulf, etc.*, R. Co. v. *Adair* (Tex. App.), 14 S. W. 1076; *St. Louis, etc.*, R. Co. v. *McKee*, 4 Tex. Civ. App. Cas. § 7.

80. *Gulf, etc.*, R. Co. v. *McCown* (Tex. Civ. App.), 25 S. W. 435; *Gulf, etc.*, R. Co. v. *Dwyer*, *supra*; *Dwyer v. Gulf, etc.*, R. Co., 69 Tex. 707, 32 Am. Eng. R. Cas. 461.

81. *Dillingham v. Fischl*, 1 Tex. Civ. App. 546, 21 S. W. 554; *Wright v. Howe* (Tex. Civ. App.), 24 S. W. 314; *Gulf, etc.*, R. Co. v. *McCown* (Tex. Civ. App.), 25 S. W. 435.

82. *Schloss v. Atchison, etc.*, R. Co., 85 Tex. 601, 22 S. W. 1014; *St. Louis, etc.*, R. Co. v. *Johnson*, 53

stipulations in a bill of lading which are the result of fraud or mistake, which may always be shown, as, for example, as to the weight of the goods. The material part of the bill of lading is that which fixes the charges per hundred pounds and the carrier may recover for the whole amount actually carried at the rate stated in the bill.⁸³

§ 35. Demand of goods by consignee.

The general rule is that the carrier is bound to deliver goods to the owner or his agent, personally, and for that purpose, to seek him at the place of delivery, in the absence of a special contract, or proof of a general usage.⁸⁴ But the carrier of goods by railway or by water is not bound to seek out the consignee and make an offer to deliver them. It is the business of the consignee to repair to the depot to receive the goods and request a delivery of them, and if the carrier refuse to deliver them without valid excuse, an action will lie.⁸⁵ An action cannot be maintained against a com-

Ark. 282, 45 Am. & Eng. R. Cas. 381, the plaintiff is bound to tender the full amount of charges due on the entire shipment; *Little Rock, etc., R. Co. v. Hanniford*, 49 Ark. 291, 30 Am. & Eng. R. Cas. 67, it is the duty of the carrier to weigh the goods within a reasonable time after their receipt, where the weight is not stated in the bill of lading, and ascertain the amount of charges according to the rates specified in the bill of lading.

83. *Baird v. St. Louis, etc., R. Co.*, 41 Fed. 591, 42 Am. & Eng. R. Cas. 281; *Johnson v. Fort Worth, etc., R. Co.*, 9 Tex. Civ. App. 619; *Gulf, etc., R. Co. v. Loonie*, 84 Tex. 259; *Sabine, etc., R. Co. v. Cruse*, 83 Tex. 460.

84. *Schroeder v. Hudson River R. Co.*, 5 Duer (N. Y.), 55.

85. *Michigan Southern R. Co. v. Bivens*, 13 Ind. 263.

Insufficient demand.—An order addressed to a railway agent as such, who was agent for an express company at the same place, and who kept the freight and express matter in the same room, to deliver to bearer any "freight" of the drawer in his possession, is sufficient to charge the express company with liability for the agent's failure to deliver to the bearer goods which had been some time to the drawer's knowledge, in the express office, there being nothing in the order calling the agent's attention to the fact that express matter was called for. *Wells, Fargo & Co. v. Windham*, 1 Tex. Civ. App. 267, 21 S. W. 402. See also *Worden v. Canadian Pac. R. Co.*, 13 Ont. Rep. 652, 30 Am. & Eng. R. Cas. 127. Compare *Morgan v. Dibble*, 29 Tex. 107, 94 Am. Dec. 264.

mon carrier for failure to carry and deliver goods intrusted to it, until a demand for the goods has been made.⁸⁶ But a demand is unnecessary, where, if made, it would be unavailing for the reason that it could not be complied with by the carrier, as where the goods were never carried to their destination, or the company had no office or agent there of whom a demand might be made;⁸⁷ or where the carrier has converted the goods by a wrongful delivery, or they have been lost or destroyed.⁸⁸ The carrier cannot be charged with conversion for a delay, however long, until the goods have been demanded of the carrier and their delivery refused.⁸⁹ An inquiry of the carrier as to what had become of the goods is not a demand so as to render the carrier liable for conversion.⁹⁰

§ 36. Waiver of right of action for wrongful delivery.

A common carrier's unauthorized delivery of goods may be ratified by the consignee.⁹¹ In the absence of notice to the contrary, any delivery which discharges the carrier, as between him and the consignee, is good as against the consignor.⁹² The owner of goods,

86. *Jarrett v. Great Northern R. Co.*, 74 Minn. 477, 77 N. W. 304; *Rome R. Co. v. Sullivan*, 14 Ga. 279; *Bird v. Georgia R. Co.*, 72 Ga. 655; *Gregg v. Illinois Cent. R. Co.*, 147 Ill. 556.

87. *Schroeder v. Hudson River R. Co.*, 5 Duer (N. Y.), 55.

88. *Lester v. Delaware, etc., R. Co.*, 92 Hun (N. Y.), 342, 36 N. Y. Supp. 907; *Fulton v. Lydecker*, 17 N. Y. Supp. 451; *Ludwig v. Meyre*, 5 W. & S. (Pa.) 435; *Wiggin v. Boston, etc., R. Co.*, 120 Mass. 201; *Missouri Pac. R. Co. v. Heidenheimer*, 82 Tex. 195, 27 Am. St. Rep. 861; *Louisville, etc., R. Co. v. Meyer*, 78 Ala. 597, 27 Am. & Eng. R. Cas. 44.

The owner of a chattel may maintain trover therefor against a carrier who, on demand, refuses to deliver it up until he shall receive for its transportation a greater amount

than the price agreed upon, and he does not waive the effect of his demand by agreeing that the goods may remain in the depot until he can correspond with another agent about the overcharge. *Northern Transp. Co. v. Selick*, 52 Ill. 249.

A judgment or receipt is competent evidence of a demand by the plaintiff in the judgment or the party who executed the receipt. *McGill v. Monette*, 37 Ala. 49.

89. *Ryland & Rankin v. Chesapeake, etc., R. Co.* (W. Va.), 46 S. E. 923.

90. *St. Louis, etc., R. Co. v. Tyler Coffin Co.* (Tex. Civ. App.), 81 S. W. 826.

91. *Converse v. Boston, etc., R. Co.*, 58 N. H. 521; *Gulf, etc., R. Co. v. Clark*, (Tex.) 18 Am. & Eng. R. Cas. 628.

92. *O'Dougherty v. Boston, etc., R. Co.*, 1 Sup. Ct. (N. Y.) 477. But

by waiving any of his rights touching the delivery, relieves the carrier from his liability, so far as the waiver extends, and if the consignee or consignor takes charge of the goods before they have arrived at the place of delivery, the carrier's risk then terminates.⁹³ A consignee, or his authorized agent, may receive goods addressed to him in the hands of a carrier, at any place, either before or after arrival at their place of destination, and such acceptance operates as a discharge of the carrier from his liability to the consignor.⁹⁴ An acceptance of a portion of the goods by the consignee or owner at a place other than that specified for their delivery, will not relieve the carrier from its obligation to deliver the remainder.⁹⁵ Where the carrier delivers goods to the wrong

the consignor does not ratify a delivery by corresponding with the consignee in reference to the subject of payment, where the former never assented to the delivery, and shortly afterwards called the carrier's attention to the matter, and insisted all the time on the liability of the carrier. *McSwegan v. Pennsylvania R. Co.*, 7 App. Div. (N. Y.) 301, 40 N. Y. Supp. 51. See *Sanquer v. London, etc., R. Co.*, 16 C. B. 163, 81 E. C. L. 163, 3 C. L. R. 811.

93. *Stone v. Waitt*, 31 Me. 409, 52 Am. Dec. 621; *Cleveland, etc., R. Co. v. Sargent*, 19 Ohio St. 438; *Atkisson v. Steamboat Castle Garden*, 28 Mo. 124, but the carrier will not be freed from the responsibility for damages incurred by a breach of his contract of affreightment.

94. *Sweet v. Barney*, 23 N. Y. 335; *Hotchkiss v. Artisans' Bank*, 2 Abb. Ct. App. Dec. (N. Y.) 203, 2 Keyes (N. Y.), 564; *Platt v. Wells*, 26 How. Pr. (N. Y.) 442, 2 Robt. (N. Y.) 116; *Haslam v. Adams Express Co.*, 6 Bosw. (N. Y.) 235; *Parsons v. Hardy*, 14 Wend. (N. Y.) 215, 28 Am. Dec. 521; *Goodwin v. Baltimore, etc., R. Co.*, 58 Barb. (N.

Y.) 195; *Jewell v. Grand Trunk R. Co.*, 55 N. H. 84; *Hill v. Humphreys*, 5 W. & S. (Pa.) 123, 39 Am. Dec. 117; *The Propeller Mohawk*, 8 Wall. (U. S.) 153; *Dobbin v. Michigan Cent. R. Co.*, 56 Mich. 522, 21 Am. & Eng. R. Cas. 85. See also *McAndrew v. Whitlock*, 52 N. Y. 40; *Sunderland v. Westcott*, 40 How. (N. Y.) 469, 2 Sweeny (N. Y.), 263; *Simmons v. Law*, 3 Keyes (N. Y.), 220; *Nelson v. Hudson River R. Co.*, 48 N. Y. 507; *Robinson v. Chittenden*, 69 N. Y. 533; *Kruder v. Ellison*, 47 N. Y. 37. Any right of the carrier to compel consignees to take goods shipped "from alongside" is waived by the carrier unloading the goods on to the deck. *The Titania*, 131 Fed. 229.

95. *Bissel v. Campbell*, 54 N. Y. 353; *Home Ins. Co. v. Western Transp. Co.*, 51 N. Y. 93; *Cox v. Peterson*, 30 Ala. 608, 68 Am. Dec. 145.

But if the carrier delivered all he received, his liability is discharged, even though the bill of lading called for more. *Abbe v. Eaton*, 51 N. Y. 410.

person, the fact that the owner receives payment from such person for a portion of the goods does not constitute a waiver of his claim against the carrier for the balance, if he does not intend such waiver.⁹⁶ Where a consignee, on being notified of the arrival of goods at a wrong destination, directs their forwarding to another place, and there receives them, such acceptance operates as a waiver of the carrier's liability for the erroneous delivery.⁹⁷

§ 37. Right of carrier to demand receipt upon delivery.

A carrier has the right to demand a receipt for goods carried by it before it will be bound to deliver the goods, and the consignee has the right to an opportunity to examine the condition of the goods before signing the receipt.⁹⁸ A regulation requiring a consignee to receipt for grain weighed into a delivery bin, before taking the same from such bin, and before he can ascertain, except from the carrier's statement, whether the quantity of grain receipted for is there or not, is unreasonable and void.⁹⁹ Where

96. *Lester v. Delaware, etc., R. Co.*, 93 Hun (N. Y.), 342, 36 N. Y. Supp. 907.

97. *Hayman v. Canadian Pac. Ry. Co.*, 43 Misc. Rep. (N. Y.) 74, 86 N. Y. Supp. 728.

98. *Skinner v. Chicago, etc., R. Co.*, 12 Iowa, 191.

A receipt required to be given for goods before they are examined is *prima facie* evidence of what it contains; but it does not conclude the party from showing the actual condition of his property. *Porter v. Chicago, etc., R. Co.*, 20 Iowa, 73.

A receipt given by a party to a common carrier for goods transported by it will not be set aside on the bare allegation that he never received such goods, with no explanation tending to explain how he came to make a formal admission of their receipt. *Chapman v. Railroad Co.*, 7 Phila. (Pa.) 204.

Where consignee of goods employed an express company to cart the goods to his home, and its agent at the depot looked at the box containing the goods, and signed a "Clear" receipt, making no complaint, this did not preclude the consignee from showing that the goods were wet. *Mears v. New York, etc., R. Co. (Conn.)*, 52 Atl. 610, 56 L. R. A. 884.

In an action against a carrier for damages to a dog in transportation, that the consignee removed the dog at its destination in the agent's absence and receipted for it in good condition is not a conclusive defense against recovery, where the consignee had not examined the dog at the time of giving such receipt. *Southern Express Co. v. Ashford*, 126 Ala. 551, 28 So. 732.

99. *Christian v. First Div. Paul, etc., R. Co.*, 20 Minn. 21.

freight is in the warehouse ready for delivery, the carrier is not bound to take receipts for it, part by part as it is taken away, but may require a receipt for the whole before delivering any.¹ A consignee of goods cannot obtain possession of them from a carrier without producing the bill of lading or accounting for it, if the carrier require it as proof of the right of the person applying to receive the goods.² But a common carrier may not refuse to deliver the goods to the consignee named in the bill of lading, on the ground that the consignee refuses to surrender the bill of lading, although he permits the carrier to inspect it.³

1. *Morris, etc., R. Co. v. Ayers*, 29 N. J. L. 393, 80 Am. Dec. 215.

2. *Bass v. Glover*, 63 Ga. 746. See

also, *Delivery to holder of bill of lading*, § 9, *ante*.

3. *Dwyer v. Gulf, etc., R. Co.*, 69 Tex. 707.

CHAPTER VI.

CONVERSION BY CARRIER—ACTIONS AGAINST CARRIER.

- SECTION
1. Carrier is liable in conversion for misfeasance.
 2. Receiving goods from one in possession not conversion.
 3. Carrier not liable in conversion for mere nonfeasance.
 4. Action for loss or injury. Nature and form of action.
 5. Actions for loss or injury. Actions *ex contractu* or *ex delicto*.
 6. Actions for loss or injury. Rights of action.
 7. Actions for loss or injury. Payment of freight.
 8. Custody and control of goods. Rights of carrier. Action by carrier against third persons.
 9. Actions for loss or injury. Parties.
 10. Actions for delay. Nature and form.
 11. Actions for delay. Conditions precedent.
 12. Actions against connecting carriers. Nature and form.
 13. Actions against connecting carriers. Rights of action.
 14. Actions against connecting carriers. Parties.
 15. Actions for refusal to receive or transport goods.

§ 1. Carrier liable in conversion for misfeasance.

The principle is well established that a common carrier may be held in trover when it is guilty of misfeasance, although the wrong may have been unintentional. Thus, trover will lie against a carrier for negligence where goods have been lost to the owner by the act of the carrier, though there may have been no intentional wrong; as where goods are by mistake, or under a forged order, delivered to the wrong person. It also lies where the carrier refuses to deliver the goods according to contract, it having the possession. A conversion implies a wrongful act, a misdelivery, a wrongful disposition or withholding of property. There must be proof of a wrongful disposition or withholding to establish conversion.¹ Misdelivery or delivery to the wrong person negligently

1. N. Y.—Wamsley v. Atlas Steamship Co., 168 N. Y. 533, 61 N. E. 895, 57 N. Y. 28; Hawkins v. Hoffman, 6 Hill (N. Y.), 588, 41 Am. Dec. 767;

made by a carrier of an article intrusted to it constitutes a con-

Packard v. Getman, 4 Wend. (N. Y.) 615, 21 Am. Dec. 166; Briggs v. New York, etc., R. Co., 28 Barb. (N. Y.) 515; Richards v. Pitts Agricultural Works, 37 Hun (N. Y.), 1; Parmenter v. American Box Mach. Co., 44 App. Div. (N. Y.) 47, 60 N. Y. Supp. 432, appeal dismissed, 162 N. Y. 648.

Ga.—Merchants' & Miners' Transp. Co. v. Moore & Co., 124 Ga. 482, 52 S. E. 802.

Ill.—Pacific Express Co. v. Shearer, 160 Ill. 215, 43 N. E. 816, 43 Cent. L. J. 35.

Mass.—Spooner v. Manchester, 133 Mass. 270.

There are cases in which evidence of demand and refusal is sufficient to sustain a recovery in conversion, but this rule applies against common carriers only in exceptional cases. Wamsley v. Atlas Steamship Co., 168 N. Y. 533.

Plaintiff shipped certain goods, which, on being refused by the consignee, plaintiff directed to be returned to him. The goods were returned under an "astray waybill," not accompanied by any bill indicating back charges, whereupon defendant's agent refused to deliver the goods until he obtained information as to the amount of such back charges, and, on obtaining such information, the agent notified plaintiff thereof, and tendered the goods to plaintiff on payment of the charges, which plaintiff refused. Held, that the agent's refusal to deliver in the first instance did not constitute a conversion, and hence the carrier was only responsible for loss accruing because of the delay in delivery after

the goods were returned. Norfolk & W. Ry. Co. v. Potter, 110 Va. 427, 66 S. E. 34.

Where possession of certain freight for transportation was legitimately obtained by a carrier, there must have been a demand therefor by the consignee and a refusal by the carrier to deliver the same in order to show a conversion, unless there was proof of a dealing with the property by the carrier otherwise. Louisville & N. R. Co. v. Britton, — Ala. —, 39 So. 585.

A carrier, having notified the owner of goods that they have arrived and that he must pay the freight and receive them, must know whether they have in fact arrived or not, and is guilty of conversion if, upon demand after the goods have arrived, he tells the owner they have not come, and fails to deliver them, although he does not in express words refuse to deliver them. Louisville & N. R. Co. v. Lawson, 88 Ky. 496, 11 Ky. Law. Rep. 38, 11 S. W. 511.

Where a carrier becomes liable to a consignee of goods for damages in transit, and such damages exceed the freight bill, its refusal to deliver the goods to the consignee on demand constitutes a conversion. Missouri Pac. R. Co. v. Peru-Van Zandt Implement Co., 73 Kan. 295, 6 L. R. A. N. S. 1058, 87 Pac. 80.

Where goods shipped do not reach the destination, the carrier is guilty of conversion and liable for their value, except where an act of God intervenes. R. W. Williamson & Co. v. Texas & P. Ry. Co., — Tex. Civ. App. —, 138 S. W. 807.

version, for which an action of trover will lie.² A carrier or warehouseman is liable in trover for the wrongful delivery of goods intrusted to it for shipment or storage; but such right of action may be waived by any action which ratifies the delivery, and thereby deprives the carrier or warehouseman of the right to recover over against the person to whom the delivery was made.³ A common carrier is liable for the conversion of goods, where, having received them to be carried to a designated place, it transports them to another place for the purpose of preventing their coming to the possession of the consignee and depriving him of their use and disposition.⁴ But to constitute a conversion of property sub-

2. Ala.—Tishomingo Sav. Inst. v. Johnson, Nesbitt & Co., 146 Ala. 691, 40 So. 503, where a bill of lading was sent to a bank as security for an attached draft, a delivery of the goods by the carrier to another than the bank was a conversion. Central R., etc., Co. v. Lampley, 76 Ala. 357, 52 Am. Rep. 334.

Ga.—Atlantic Coast Line R. Co. v. Goodwin, 1 Ga. App. 351, 57 S. E. 1070.

Ill.—St. Louis, etc., R. Co. v. Rose, 20 Ill. App. 670.

Md.—Seaboard Air Line Ry. Co. v. Phillips, 108 Md. 285, 70 Atl. 232.

Mass.—Forbes v. Boston, etc., R. Co., 133 Mass. 154; Claflin v. Boston, etc., R. Co., 7 Allen (Mass.), 341.

Mich.—Gibbons v. Farwell, 63 Mich. 344, 6 Am. St. Rep. 301, 29 N. W. 855.

Minn.—Jellett v. St. Paul, etc., R. Co., 30 Minn. 265, 15 N. W. 237.

N. Y.—Security Trust Co. v. Wells, Fargo & Co. Express, 81 App. Div. (N. Y.) 426, 80 N. Y. Supp. 830, affd. 178 N. Y. 620, 70 N. E. 1109; Packard v. Gitman, 4 Wend. (N. Y.) 613, 21 Am. Dec. 166.

Tenn.—Erie Despatch v. Johnson, 87 Tenn. 490, 11 S. W. 441.

Tex.—Missouri, etc., R. Co. v. Seley, 31 Tex. Civ. App. 158, 72 S. W. 89.

W. Va.—Clarke-Lawrence Co. v. Chesapeake & O. R. Co., 63 W. Va. 423, 61 S. E. 364. See also, Carrier's liability for misdelivery, § 21, chap. 5.

A carrier of goods under a special contract fixing a conventional value thereon in consideration of a reduction of freight, but not including a loss by wrong delivery, is liable for their full value, where it negligently makes a wrong delivery. Savannah, etc., R. Co. v. Sloat, 93 Ga. 803, 20 S. E. 219, 61 Am. & Eng. R. Cas. 207.

The conversion must be alleged in the complaint or declaration. Central R. Co. v. Cooper, 95 Ga. 406, 22 S. E. 549, 2 Am. & Eng. R. Cas. N. S. 688.

Where a carrier did not notify the consignee of the arrival of a shipment of grain, but on the order of the purchaser thereof removed the grain to another point, there was a conversion of the grain. National Bank v. Southern Ry. Co., 135 Mo. App. 74, 115 S. W. 517.

3. A. D. Blowers & Co. v. Canadian Pac. R. Co., 155 Fed. 935.

4. Baltimore, etc., R. Co. v. O'Donnell, 49 Ohio St. 489, 28 Ohio L. J.

ject to a bailment, there must be such an intention of deviation from the contract as would be tantamount to an assertion of right or dominion over the property, inconsistent with the bailor's rights of ownership.⁵ Tender of goods to the owner after conversion, and his refusal to accept them, will not cast on him the loss if they are subsequently stolen, and the motive by which a party was controlled in the conversion of property is of no avail as a defense, though it may be shown to prevent the recovery of exemplary damages.⁶ A carrier is liable in trover for goods delivered to the consignee in violation of instructions from the shipper not to deliver them without a bill of lading.⁷ A common carrier is liable in an action of trover for the value of goods delivered to a person other than the one described in the bill of lading, upon his presentation of it without endorsement, notwithstanding the existence of a custom to deliver goods to any one in possession of the bill of lading.⁸ The carrier must bear the risk of delivering

318, 21 L. R. A. 117, 32 N. E. 476. Where goods were wrongfully delivered by a carrier to a steamship company instead of to the owner, and were carried to another place, the company, having notice of the ownership, had no lien on the goods for freight, and on selling them was liable for conversion; for, though it was the duty of such company to receive goods tendered to it for shipment by connecting carriers, it was not exempt from liability for goods shipped by one without authority. *Liefert v. Galveston, etc., R. Co.* (Tex. Civ. App.), 57 S. W. 899. A deviation from the route called for by the contract of shipment does not constitute a conversion by the carrier, but it becomes an insurer of the property, assuming the risk of any loss that may occur. *Southern Pac. R. Co. v. Booth* (Tex. Civ. App.), 39 S. W. 585.

5. *Direct Nav. Co. v. Davidson* (Tex. Civ. App.), 74 S. W. 790, holding that a bailee of a boat, who,

when he had finished using the same, left her in the possession and under the dominion and control of the owner, and never afterwards asserted any control, ownership, or rights to the boat, could not be held liable for a conversion thereof, although the boat was not delivered to such owner at the place called for by the contract.

6. *Baltimore, etc., R. Co. v. O'Donnell*, *supra*.

7. *Foggan v. Lake Shore, etc., R. Co.*, 16 N. Y. Supp. 25, 40 St. Rep. (N. Y.) 718.

8. *Louisville, etc., R. Co. v. Barkhouse*, 10 Ala. 543, 13 So. 534. A carrier is not liable to a consignor as for a conversion of goods consigned to the latter's order, because it delivered the same to the purchaser of the goods whom it was directed to notify, without the surrender of the bill of lading contrary to the provisions thereof, where the purchaser subsequently paid the

the goods to the person entitled to them under the bill of lading and its endorsements; and where the bill directs delivery to the vendor's order, or his assigns, the carrier is notified that he must not deliver to the consignee without the bill properly endorsed by the consignor, and if he delivers otherwise he will be liable.⁹ A carrier which delivers to a shipper goods of which the bill of lading has been transferred to a *bona fide* holder by the consignee, to whom it was delivered by the shipper, is liable to the holder for a conversion of the goods.¹⁰ A failure to deliver to the next connecting carrier entitled to receive the consignment constitutes a conversion.¹¹ The negligence of the consignee of goods to call for the same and pay freight, within a reasonable time after they reach their destination, will not justify the carrier in delivering the same to an unauthorized person, or to a person in violation of the written instructions of the owner.¹² A failure or refusal to deliver goods to the party entitled to delivery, or to return them to the shipper, constitutes a conversion and renders the carrier liable.¹³ But unless there is an absolute denial by the carrier of

draft to which the bill of lading was attached to the bank which held it for collection, although the bank failed to remit the proceeds, and subsequently became insolvent. *Witt v. East Tennessee, etc., R. Co.*, 99 Tenn. 442, 41 S. W. 1064, 8 Am. & Eng. R. Cas. N. S. 380.

9. *Grayson County Nat. Bank v. Nashville, etc., R. Co.* (Tex. Civ. App.), 79 S. W. 1094.

Where bills of lading were pledged to secure advances made to the purchaser of the goods, and on bankruptcy of the purchaser a part of the property covered by the bills of lading was in possession of a carrier, its refusal to deliver the property to the pledgee of the bills of lading, except on surrender thereof, was a conversion of the property. *First Nat. Bank v. San Antonio, etc., R. Co.* (Tex.), 77 S. W. 410.

10. *Missouri Pac. R. Co. v. Heidenheimer*, 82 Tex. 195, 17 S. W. 608.

11. *Georgia R. Co. v. Cole*, 68 Ga. 623.

12. *Indianapolis, etc., R. Co. v. Herndon*, 81 Ill. 143, holding that where parties shipped fruit trees to a place to their own address, as consignees, the carrier was not authorized, either at common law or by statute, to place the trees in the hands of a stranger, with directions to him to sell enough of them to pay the charges of transportation; and if it does so, it will be liable in trover to the owners.

13. *Loeffler v. Keokuk, etc., Packet Co.*, 7 Mo. App. 185, a refusal to deliver except upon an unreasonable condition constitutes a conversion.

Trover against a carrier for goods damaged during transportation will lie without payment of the freight,

the person's right to a delivery, or the shipper's right to a return of the goods, or unless the excuses for failure to deliver or return are unreasonable, inconsistent, or made in bad faith, there is no conversion by the carrier, even on clear proof of demand for the goods and failure or refusal to deliver or return.¹⁴ Where a station agent had reasonable doubts as to whether a charge for detention of a car containing plaintiff's goods was lawful, and as to whether the railroad company would insist on payment, his refusal to deliver the goods to the owner before obtaining instructions did not constitute a conversion.¹⁵ The refusal by a railroad company to deliver goods to the owner after they had been attached as the property of another did not constitute a conversion,

if at all, only where the damages exceed or equal the amount of the freight. *Miami Powder Co. v. Port Royal, etc., R. Co.*, 38 S. C. 78, 16 S. E. 339, 55 Am. & Eng. R. Cas. 688, 20 L. R. A. 123.

The failure of an express company to deliver goods intrusted to it for carriage, or to return them on demand, because of their loss, does not constitute a conversion by it of the goods. *Goldbowitz v. Metropolitan Express Co.*, 91 N. Y. Supp. 318.

14. *Rubin v. Wells, Fargo Express Co.*, 85 N. Y. Supp. 1108.

Where a common carrier receives merchandise from a consignor to transport, and which, through delay in reaching destination, is refused by the consignee, there is no obligation on the part of the carrier to return it to the consignor unless ordered so to do, and its failure to so return it is not a conversion of the goods. *Louisville, etc., R. Co. v. Heilprin*, 95 Ill. App. 402.

Where goods were delivered to an express company for carriage, and the consignor, within two months after they were sent, refused to re-

ceive them back on the company's tender, made because the consignees could not be found, and the value of the goods at the time of the tender was the same as at the time the company received them, the consignor cannot recover back the goods and damages against the company for non-delivery. *Brookstone v. Westcott Express Co.*, 29 Misc. Rep. (N. Y.) 634, 61 N. Y. Supp. 72. See *Alabama Midland Ry. Co. v. Darby*, 119 Ala. 531.

Where the party entitled to delivery sustains no real damages, the recovery should be for only nominal damages. *Hiort v. London, etc., R. Co.*, 4 Exch. Div. 188, 48 L. J. Exch. 545, 40 L. T. 674, 27 W. R. 778.

15. *Hett v. Boston, etc., R. Co.* (N. H.), 44 Atl. 910; *Robinson v. Burleigh*, 5 N. H. 225; *Fletcher v. Fletcher*, 7 N. H. 452; *Sargent v. Gile*, 8 N. H. 325, 331; *Vaughan v. Watt*, 6 M. & W. 492; *Hollins v. Fowler*, L. R. 7 H. L. 757, 766; *Cushing v. Breck*, 10 N. H. 111, 116; *Eastman v. Association*, 65 N. H. 176, 18 Atl. 745, 5 L. R. A. 712.

where the company disclaimed dominion over them by informing him that the goods were not in its possession, but in the custody of the law.¹⁶ An initial carrier who transports goods delivered for carriage to a wrong point where they are delivered to a person not entitled to receive them is liable in an action for conversion, as well as the last connecting carrier which made the delivery.¹⁷ Delay on the part of a carrier in delivering goods is not a conversion, no matter how long continued, so as to make it liable for their value, and, if the goods are safely kept, the carrier cannot be charged with conversion until they have been demanded of the carrier and their delivery refused.¹⁸ But a shipper who, after a wrongful delivery of the goods by a carrier to a third person, agrees to wait for their delivery until the return of the station agent, may treat the goods as converted and maintain an action for their value, where the carrier fails for seven days after the return of the agent to recover and deliver the goods, and a tender

16. *Hett v. Boston, etc., R. Co.*, (N. H.) 44 Atl. 910; *Fletcher v. Fletcher*, 7 N. H. 452; *Osgood v. Carver*, 43 Conn. 24, 30; *Stiles v. Davis*, 1 Black (U. S.), 101, 17 L. Ed. 33. See *Western, etc., R. Co. v. Trust Co.*, 107 Ga. 512; *Thomas v. Northern Pac. Express Co.*, 73 Minn. 185; *Ocos Bay, etc., R. Co. v. Siglin*, 34 Or. 80.

17. *St. Louis, etc., R. Co. v. Larned*, 103 Ill. 293, 6 Am. & Eng. R. Cas. 436.

An initial carrier whose contract exempts it from liability "for anything beyond its line, . . . excepting to protect the through rate of freight named therein," is not liable for a conversion because of the failure of the connecting carrier to deliver the property at the place of destination. *Little Rock, etc., R. Co. v. Odom*, 63 Ark. 326, 38 S. W. 339.

18. *Ryland & Rankin v. Chesapeake, etc., R. Co.* (W. Va.), 46 S. E. 923, also holding that a carrier is not liable for conversion for goods

in his possession while they remain in specie, but the shipper can only recover the damages sustained by delay. See also, *Liability for delay*, chap. 8.

Where a consignor having heard nothing from the goods shipped, asked the carrier what had become of the goods, and was told that he did not know, there was no demand, so as to render the carrier guilty of conversion. *St. Louis, etc., R. Co. v. Tyler Coffin Co.* (Tex. Civ. App.), 81 S. W. 826. Where, upon refusal of the consignee to accept the goods, they are stored by the carrier, and upon a claim being made for the goods several months afterward, the carrier informs the consignor of the facts and inquires as to what disposition it shall make of the goods, it is liable only for delay in sending notice of the consignee's refusal and not for conversion. *Fishman v. Platt*, 90 N. Y. Supp. 354.

made after notice to the carrier of the shipper's election to treat the goods as converted is too late.¹⁹ Where a railroad company delivered a consignment of wheat to another than the consignee, subject to the consignor's order, such erroneous delivery constituted a technical conversion, rendering the railroad company immediately liable for the price of the wheat; so that it was not relieved by its subsequent destruction in the hands of such third person by an unprecedented storm.²⁰ Where a carrier delivers goods to the person to whom they are consigned, after notice by the real owner not to do so except on his written order, no further demand is necessary to entitle such owner to maintain an action against the carrier for conversion.²¹ Where a carrier delivers goods at their destination, he is not guilty of conversion, and the shipper should receive the same and sue for negligence or for breach of contract for their injured condition; and the measure of damages in either action would be the same.²² Trover will lie for the value of property illegally withheld under an unlawful claim for freight charges, and a demand, tender, and refusal to deliver constitute *prima facie* evidence of a conversion.²³ Where, on a dispute between a carrier and the owner of certain goods as to the amount due for their carriage, the carrier withheld them until the amount claimed by him to be due should be paid, a tender was not necessary before bringing suit for their conversion, where there was no refusal by the owner to pay what he deemed a proper amount.²⁴ It is the duty of a carrier which has received goods consigned to the shipper's order to deliver in accordance with such order, and a failure or refusal so to do without lawful excuse renders the carrier liable for conversion.²⁵ A forwarding company

19. *Hamilton v. Chicago, etc., R. Co.*, 103 Iowa, 325, 72 N. W. 536, 8 Am. & Eng. R. Cas. N. S. 526.

20. *Missouri, etc., R. Co. v. Seley*, 31 Tex. Civ. App. 158, 72 S. W. 89.

21. *Lester v. Delaware, etc., R. Co.*, 92 Hun (N. Y.), 342, 36 N. Y. Supp. 907, where the consignee had been plaintiff's agent and the goods were delivered after termination of the agency and notice by the owner not to do so, it is no defense that such person had a lien on the goods

for freight paid, where it appears that he at the time owed the owner of the goods a larger sum.

22. *Redmon v. Chicago, etc., R. Co.*, 90 Mo. App. 68.

23. *Beasley v. Baltimore & P. R. Co.*, 27 App. D. C. 595.

24. *Gates v. Bekins*, 44 Wash. 422, 87 Pac. 505.

25. *Atchison, etc., R. Co. v. Schriver*, 72 Kan. 550, 84 Pac. 119, 4 L. R. A. (N. S.) 1056.

contracting to forward goods without prepayments of charges is liable for breach of contract, where its agent at an intermediate point refuses to forward the goods without the charges being prepaid, regardless of whether the company is a mere forwarder and not a common carrier, and if the forwarding company knew the place of residence of the consignee and its agent refused to deliver the goods, no demand was necessary to render the company liable for conversion.²⁶ The forcible removal of parcels from a passenger whose ticket does not entitle him to carry them, and the transfer of them to an express car, with orders to carry them onward, constitute a conversion.²⁷ That a railway company's act in appropriating to its own use coal belonging to a consignee was through an honest mistake, does not affect the consignee's right to redress for the conversion.²⁸ Trover will lie against a common carrier for misdelivery, or an appropriation of the property to its or his own use, or for any act or dominion of ownership antagonistic to and inconsistent with plaintiff's claim or right; but not for goods lost by accident or stolen, or for nondelivery, unless there be a refusal to deliver while the carrier is in possession; nor for any act or omission which amounts to negligence merely, and not to an actual wrong.²⁹ Where the owner and consignee of freight is at the depot when his goods arrive and demands them, and is refused, and the goods are reshipped to some other destination, and the carrier refuses to pay for them, the owner may sue for conversion.³⁰ Where a carrier, without hire, agrees to deliver a package safely, and fails to do so, trover will only lie in case of an actual conversion.³¹

§ 2. Receiving goods from one in possession not conversion.

A common carrier must accept freight from every one offering the same, and is not liable for conversion to the true owner in

26. *Lee v. Fidelity Storage & Transfer Co.*, 51 Wash. 208, 98 Pac. 658.

27. *Bullock v. Delaware, etc., R. Co.*, 60 N. J. Law. 24, 36 Atl. 773, 7 Am. & Eng. R. Cas. N. S. 370, 37 L. R. A. 417.

28. *Frazier v. Atchison, etc., R. Co.*, 104 Mo. App. 355, 78 S. W. 679.

29. *Central R., etc., Co. v. Lamp-ley*, 76 Ala. 357, 52 Am. Rep. 334.

30. *St. Louis & S. F. R. Co. v. Dunham*, — Okl. —, 129 Pac. 862.

31. *Delaware Bank v. Smith*, 1 Edm. Sel. Cas. (N. Y.) 351.

accepting freight from a party apparently rightfully in possession thereof, unless the true owner intervenes before the goods are delivered and demands them,³² and gives notice of his right to the property and his intention to enforce it, though the shipper had no right to possession in fact.³³ A carrier is not guilty of conversion where he, in good faith, takes goods from the possession of the owner by direction of another having apparent control of the goods and the present capacity of investing himself with actual possession, and delivers them to such other person in another place.³⁴ Where the conditions of a valid chattel mortgage have been broken, and the mortgagee is entitled to possession, a common carrier is not liable to the mortgagor for a diversion of the shipment of such property and delivery to the mortgagee, demanding possession, while it is still in the carrier's hands.³⁵ Where a carrier received railroad iron for transportation in good faith, without knowledge that it was the carrier's own property, and thereafter discovered such fact, the carrier could avail itself thereof as a defense to an action for conversion.³⁶

§ 3. Carrier not liable in conversion for mere non-feasance.

The general rule is that a carrier is not liable in conversion for mere non-feasance, although he may be liable for negligence.

32. *Robert O. White Live Stock Commission v. Chicago, etc., R. Co.*, 87 Mo. App. 330.

33. *Central of Ga. Ry. Co. v. Shellnut*, 131 Ga. 404, 18 L. R. A. N. S. 494, 62 S. E. 294.

34. *Gurley v. Armstead*, 148 Mass. 267, 19 N. E. 389, 2 L. R. A. 80, wherein the court said: "It is conceded that whoever receives goods from one in actual, though illegal, possession thereof, and restores the goods to such person, is not liable for a conversion by reason of having transported them; *Strickland v. Barrett*, 20 Pick. (Mass.) 415; *Leonard v. Tidd*, 3 Metc. (Mass.) 6. And this would be so apparently, even if the goods thus received were restored to

the wrongful possessor after notice of the claim of the true owner. *Loring v. Mulcahy*, 3 Allen (Mass.), 575; *Metcalf v. McLaughlin*, 122 Mass. 84."

A common carrier who receives goods to carry from one not authorized to deliver them to him, is a trespasser, and may be sued in trover for the goods, as any other illegal taker may be. *Southern Express Co. v. Palmer*, 48 Ga. 85.

35. *Johnston v. Chicago, etc., R. Co.*, 70 Neb. 364, 97 N. W. 479.

36. *Valentine v. Long Island R. Co.*, 187 N. Y. 121, 79 N. E. 849, revg. 102 App. Div. (N. Y.) 419, 92 N. Y. Supp. 645.

Thus, trover will not lie for the mere omission of the carrier; as, where the property has been lost or stolen through his negligence and so cannot be delivered to the owner, and the inability to deliver does not arise from any act of the carrier.³⁷ Mere non-delivery by a common carrier will not constitute a conversion, nor will a refusal to deliver, on demand, if the goods have been lost through negligence, or have been stolen. A conversion implies a wrongful act, a misdelivery, a wrongful disposition or withholding of property. There must be proof of a wrongful disposition or wrongful withholding.³⁸ If, at the time of the demand a reason-

37. *Wamsley v. Atlas Steamship Co.*, 168 N. Y. 533, 61 N. E. 896, revg. 50 App. Div. (N. Y.) 199, 63 N. Y. Supp. 761; *Hawkins v. Hoffman*, 6 Hill (N. Y.), 588, 41 Am. Dec. 767; *Packard v. Getman*, 4 Wend. (N. Y.) 615, 21 Am. Dec. 166; *Briggs v. New York, etc., R. Co.*, 28 Barb. (N. Y.) 515; *Gillet v. Roberts*, 57 N. Y. 28; *Richards v. Pitts Agricultural Works*, 37 Hun (N. Y.), 1; *Parmenter v. American Box Machine Co.*, 162 N. Y. 648, affg. 44 App. Div. (N. Y.) 47; *Spooner v. Manchester*, 133 Mass. 270; *Pacific Express Co. v. Shearer*, 160 Ill. 215, 43 N. E. 816, 43 Cent. L. J. 35; *Bowlin v. Nye*, 64 Mass. (10 Cush.) 416.

A steamship company is not liable in action of conversion for the value of a package delivered to it by a passenger on one of its steamships and placed in the storeroom by one of its servants, and which could not be found prior to the commencement of the action, where, although subsequently found on the vessel in circumstances raising a presumption that it had not been removed therefrom, there is no evidence showing the circumstances of its removal from the storeroom, and it may have been stolen by a fellow passenger or have been removed and misplaced by some

one for whose acts the defendant was not responsible, in an action for conversion, although possibly liable for negligence; and the refusal of the court to charge that "in such case the carrier can only be made liable upon proof of actual conversion" is reversible error. *Wamsley v. Atlas Steamship Co.*, 168 N. Y. 533, 61 N. E. 896, revg. 50 App. Div. (N. Y.) 199, 63 N. Y. Supp. 761.

38. *Magnin v. Dinsmore*, 70 N. Y. 410, 26 Am. Rep. 608, affg. 40 N. Y. Super. Ct. 512, 42 Id. 16; *Seovill v. Griffith*, 12 N. Y. 509; *Rosenfeld v. Central Vermont R. Co.*, 111 App. Div. (N. Y.) 371, 97 N. Y. Supp. 905.

A railroad company properly refuses to deliver property consigned to designated persons to another person, although the latter is the real owner, where he has the power to produce evidence of his authority to receive such property and fails to produce it, and the company does not know that he is the owner. *Gulf, etc., R. Co. v. Fowler*, 12 Tex. Civ. App. 683, 34 S. W. 661.

An express company is not liable in trover for failure to deliver a trunk on demand, where prior to demand the trunk has been destroyed by fire. *Southern Express Co. v. Sinclair*, 130 Ga. 372, 60 S. E. 849.

able excuse be made in good faith for the non-delivery, the goods being evidently kept with a view to deliver them to the true owner, there is no conversion.³⁹ Where goods are sent by a sealed railroad car to be delivered unbroken at the place of destination, if the goods are removed for the convenience of the carrier, and are afterwards delivered without loss of quantity and without injury, the carrier is not liable in trover.⁴⁰ A carrier is not liable for the conversion of goods which, because of packages being broken before delivery to the consignee, he refused to receive, because the agent caused the goods all to be unpacked and inventoried, in order to ascertain their character and condition, and then repacked them.⁴¹ Where part of a consignment of goods is damaged in the transportation but capable of being repaired and the consignee refuses to receive them, the carrier is not liable as for a conversion of such damaged goods.⁴² Where a suit of clothes is manufactured to order, to be inspected by the purchaser before acceptance, and the carrier tenders the goods, and the consignee refuses to accept them, but states that he will shortly call for them, and the carrier stores them for several weeks, when the consignee absolutely rejects them, and the consignor refuses to order their return, on being informed of the rejection, on the ground that they are no longer of any use to him, the consignor cannot recover of the carrier for conversion.⁴³ Where a shipper delivered goods to a carrier, for delivery to a person named as consignee in a non-negotiable shipping receipt, and the shipper drew on the consignee for the price and attached the draft to the receipt; subsequently the carrier, at the shipper's request, delivered the goods to a third person; thereafter the consignee accepted the draft and paid it, it was held that the consignee had not acquired any title to the goods, and could not sue the carrier for conversion.⁴⁴ Where a carrier tenders the goods to the consignee, and the latter denies ownership

39. *McEntee v. New Jersey Steam-boat Co.*, 45 N. Y. 35, 6 Am. Rep. 28; *Rome R. Co. v. Sullivan*, 14 Ga. 277; *The Hattie Palmer*, 63 Fed. 1015.

40. *Tucker v. Housatonic R. Co.*, 39 Conn. 447.

41. *Silverman v. St. Louis, etc.*, R. Co., 51 La. Ann. 1785, 26 So. 447.

42. *St. Louis, etc., R. Co. v. Johnson*, 53 Ark. 282, 45 Am. & Eng. R. Cas. 381.

43. *Levy v. Weir*, 38 Misc. Rep. (N. Y.) 361, 77 N. Y. Supp. 917.

44. *Green v. Baltimore & I. R. Co.*, 206 Mass. 331, 92 N. E. 622.

or obligation to receive the same, and the carrier, in reliance on such denial, returns the goods to the shipper on the latter's order, the consignee is estopped to sue the carrier for conversion.⁴⁵ A refusal to deliver goods, where they are retained by virtue of the carrier's lien for charges of transportation, does not constitute a conversion.⁴⁶ The rule that a consignee must pay or tender to a carrier the legal charges for transportation in order to entitle him to the possession of his goods, or to sustain an action for failure or refusal of the carrier to deliver the goods,⁴⁷ has no application in an action for the conversion of the goods.⁴⁸ The mere intent on the part of a carrier, prior to delivery, to collect exorbitant charges for the carriage of goods, does not constitute conversion, there being no evidence of an intent to retain the goods in case of nonpayment.⁴⁹

§ 4. Actions for loss or injury.—Nature and form of action.

In suits against common carriers for loss of or injury to goods, plaintiff may declare in case or assumpsit at his election.⁵⁰ Where the carrier lost part of the goods, and sold the balance at the point of destination, assumpsit is the proper form of action for the shipper to bring to recover the proceeds of the sale from the carrier.⁵¹ Where defendant received for transportation certain bars of iron, and, while on the road, his vehicle broke down, and the iron was left on the highway over night, and on arrival at his destination, it was discovered that two bars of the iron were missing, an action of trover would not lie against the carrier, but the shipper's action was on the contract.⁵² A suit for two bales of

45. *Stafsky v. Southern Ry. Co.*, — Ala. —, 39 So. 132.

46. See *Carrier's lien for charges*, chap. 16.

47. *St. Louis, etc., R. Co. v. Johnson*, 53 Ark. 282, 45 Am. & Eng. R. Cas. 381; *Henderson v. Three Hundred Tons of Iron Ore*, 38 Fed. 36; *White v. Canadian Pac. R. Co.*, 6 Manitoba L. R. 169.

A shipper is not bound to prepay charges in order to maintain an action for failure to furnish cars.

Cleveland, etc., R. Co. v. Perishow, 61 Ill. App. 179.

48. *Baltimore, etc., R. Co. v. O'Donnell*, 49 Ohio St. 489, 28 Ohio L. J. 318, 32 N. E. 476, 21 L. R. A. 117.

49. *Manda v. Wells, Fargo & Co.*, 47 N. Y. Supp. 182, 21 Misc. Rep. 308.

50. *Mershon v. Hobensack*, 22 N. J. Law (2 Zab.), 372.

51. *Stevens v. Sayward*, 69 Mass. (3 Gray) 108.

52. *Moses v. Norris*, 4 N. H. 304.

cotton alleged to have been lost by a carrier out of shipments covering a season cannot be maintained as a suit on special contract for a particular shipment, where the allegation as to the loss is general, and it cannot be shown out of which shipment the loss occurred.⁵³ Where a carrier delivers the goods at their destination, he is not guilty of conversion, and the shipper should receive the same and sue for negligence or for breach of contract for their injured condition; and the measure of damages in either action would be the same.⁵⁴ A shipper whose goods are lost during transit may sue in tort for a breach of the common-law duty of the carrier to deliver, which originates at the place of delivery, or he may sue for breach of the contract of transportation, or he may treat the carrier as a bailee and allege the specific tortious act by which the goods were lost, and found his right to recover thereon, which originates at the place where the tortious act occurred.⁵⁵ An action will be presumed to be upon a carrier's common-law liability, and not under the Civil Code, where the essential allegation to statutory liability, that the goods were received "in good order," or "as in good order," is not made.⁵⁶ Unless the property shipped is totally destroyed or converted, the carrier is not liable for its full value as for conversion, but the remedy is an action for injuries to the property as for breach of the contract of carriage.⁵⁷ An action of trespass may be maintained against a common carrier for negligence in transporting goods, although a contract may have been entered into between the shipper and the carrier.⁵⁸ Where

53. *Illinois Cent. R. Co. v. Gross*, — Miss. —, 22 So. 946.

54. *Redmon v. Chicago, etc., R. Co.*, 90 Mo. App. 68.

55. *Merritt Creamery Co. v. Atchison, etc., Ry. Co.*, 128 Mo. App. 420, 107 S. W. 462.

The rule that, where a carrier sued for the loss of goods during transit sustains the burden of showing that the loss was the result of an act of God, the burden of proving that the carrier was guilty of negligence contributing to the loss is on the shipper, goes only to a matter of defense, and does not operate to change either the

nature or the situs of the cause of action; and, where the defensive matter is met by proof of concurring negligence, the cause rests on the failure of the carrier to deliver the goods at their destination. *Id.*

56. *Central of Ga. Ry. Co. v. Jones*, 7 Ga. App. 165, 66 S. E. 492.

57. *Parsons v. United States Express Co.*, 144 Iowa, 745, 123 N. W. 776.

58. *Howard v. American Express Co.*, 47 Pa. Super. Ct. 416; *Soloman v. Adams Express Co.*, 47 Pa. Super. Ct. 423.

goods, though injured by a carrier, retain a substantial value, the owner cannot refuse to take them, and sue the carrier for their entire value; but can recover only for the diminution in value.⁵⁹ Where property is injured in transportation through the negligence of the carrier, the owner cannot refuse to accept it, and sue for its market value, but may recover only for the injury.⁶⁰ In all actions on the case, against a carrier for a loss or injury done to property, the wrong is the gist of the action, and the contract collateral thereto; but, in all actions of assumpsit against a carrier, the contract to deliver is the gist of the action.⁶¹ Where, by special contract between the carrier and the shipper of live stock, the relation is changed from that of common carrier, an action to recover for damage to the stock must be brought on the contract, and not against defendant as a common carrier.⁶²

§ 5. Actions for loss or injury.—Actions ex contractu or ex delicto.

The liabilities of a carrier depend not only on his contract, but also on obligations imposed by law; and an action may be brought either on the contract or for negligence or damage to person or property, as the case may be.⁶³ A shipper may at his election maintain assumpsit or an action in tort for goods lost by a common carrier.⁶⁴ Where there is a special contract varying the common-law liability of the carrier, the action is properly brought on the special contract, and not on the common-law liability.⁶⁵ Where a common carrier, by contract, limits its liability for damages not caused by its negligence, the owner of goods destroyed in transit by fire must sue on the contract, and not on the common-law liability.⁶⁶ Where, through the negligence of the ferryman to pro-

59. *McGrath v. Charleston & W. C. Ry. Co.*, 91 S. C. 552, 75 S. E. 44.

60. *Gulf, etc., Ry. Co. v. Everett & Long* (Tex. Civ. App.), 83 S. W. 257; *Gulf, etc., Ry. Co. v. H. B. Pitts & Son* (Tex. Civ. App.), 83 S. W. 727.

61. *Carter v. Graves*, 17 Tenn. (9 Yerg.) 446.

62. *Kimball v. Rutland & B. R. Co.*, 26 Vt. 247, 62 Am. Dec. 567.

63. *Central Trust Co. v. East Tennessee, etc., Ry. Co.*, 70 Fed. 764.

64. *Catlin v. Adirondack Co.*, 81 N. Y. 639, 11 Abb. N. C. 377.

65. *Boaz v. Central Ry., etc., Co.*, 87 Ga. 463, 13 S. E. 711.

66. *Indianapolis, etc., Ry. Co. v. Forsythe*, 4 Ind. App. 326, 29 N. E. 1138.

vide a suitable landing stage, plaintiff's team fell into a stream, and was lost, plaintiff may sue the ferryman on his contract as carrier or in tort.⁶⁷ Generally damages for delay in shipment or loss of property while in a carrier's custody may be recovered either in an action *ex contractu* or one *ex delicto* at the option of the pleader.⁶⁸ It is immaterial to a carrier whether an action to recover for loss of or injury to freight be upon contract or in tort, so that the allegations are sufficient to show a cause of action.⁶⁹

§ 6. Actions for loss or injury.—Rights of action.

The owner of goods injured by a carrier may sue the carrier for their loss or injury, though he has no contract with the carrier for the carriage, on the ground that the carrier has the goods lawfully in his possession, and has become obligated to carry them safely and deliver them to the consignee, subject only to a lien for his charges, so that a wrongful failure or refusal to do so is a tort.⁷⁰ A cause of action against a carrier for damages to goods in transit accrues when the goods are delivered in a damaged condition.⁷¹ Where the loss of government property caused by the wreck of a train was without fault on the part of the government or its officers and is not shown to have come within the recognized rules which exempt the carrier from liability, the government may recover the value of the property lost or destroyed.⁷² Where a railroad company refused to deliver a car load of fruit to the owner for the specific reason that he would not pay the amount of the freight demanded, which was in excess of that due and offered by the owner, and the fruit was injured by being frozen before the

67. *Smith v. Seward*, 3 Pa. St. (3 Barr.) 342.

68. *Wernick v. St. Louis & S. F. R. Co.*, 131 Mo. App. 37, 109 S. W. 1027.

A shipper, whose goods are damaged while being transported by a carrier, has the choice of declaring either in assumpsit on the contract or in tort for breach of duty imposed by law to carry safely. *Blackmer &*

Post Pipe Co. v. Mobile & O. R. Co., 137 Mo. App. 479, 119 S. W. 1.

69. *Kansas City Southern Ry. Co. v. Rosebrook-Josey Grain Co.* (Tex. Civ. App.), 114 S. W. 436.

70. *Schlosser v. Great Northern Ry. Co.*, 20 N. D. 406, 127 N. W. 502.

71. *St. Louis S. W. Ry. Co. v. Phoenix Cotton Oil Co.*, 88 Ark. 594, 115 S. W. 393.

72. *Florida Cent. & P. R. Co. v. United States*, 43 Ct. Cl. (U. S.) 572.

railroad company discovered its error, the fact that at the time he demanded the goods the bill of lading had not been transferred to the owner by the bank to which the goods were consigned was not fatal to his right to recover for the injury to the fruit.⁷³ Where the carrier lost part of the goods, and sold the balance at the point of destination, no demand on him for the proceeds is necessary to enable the shipper to maintain an action therefor, though, if it were, the commencement by the carrier of an action for a balance of freight, being equivalent to a refusal to account for the proceeds, gave the shipper an immediate right of action.⁷⁴ Where State bonds intrusted to an express company for delivery are lost through its negligence, the owner may recover their value without stating in the complaint, and without having furnished to the company as a condition precedent, the numbers or dates of the bonds; there being no rule of the company requiring it.⁷⁵ An action may be maintained against a carrier for loss of goods without proof of demand at the place of destination, when the evidence shows that the goods never reached the destination.⁷⁶

§ 7. Actions for loss or injury.—Payment of freight.

In an action for loss of goods, payment or tender of freight need not be proved.⁷⁷ The owner of goods shipped, part of which are lost or destroyed by neglect of the carrier, may maintain an action against him for the value of the goods lost, without previous payment or tender of freight, if he has received the remainder of the goods with the carrier's consent.⁷⁸ It is the duty of a consignee whose property is injured while in the control of a carrier to pay all freight charges, and then sue the carrier for the injury done.⁷⁹ In an action against a carrier for damages to goods ship-

73. *Clegg v. Southern Ry. Co.*, 135 N. C. 148, 47 S. E. 667, 65 L. R. A. 717.

Right of owner of goods to recover damages from carrier, though not the shipper. See *Harvey v. Terre Haute & I. R. Co.*, 6 Mo. App. 585, memorandum.

74. *Stevens v. Sayward*, 69 Mass. (3 Gray) 108.

75. *Martin v. American Express Co.*, 19 Wis. 336.

76. *Louisville & N. R. Co. v. Meyer*, 78 Ala. 597.

77. *Ferguson v. Cappeau*, 6 Har. & J. (Md.) 394.

78. *Alden v. Pearson*, 69 Mass. (3 Gray) 342.

79. *Miami Powder Co. v. Port Royal & W. C. Ry. Co.*, 38 S. C. 78, 16 S. E. 339, 21 L. R. A. 123.

ped over defendant's road, where the damages are equal to or exceed the amount of the freight charges, it is not necessary that the plaintiff should allege or prove that he had paid or tendered the amount due for freight.⁸⁰ Where the consignor delivers to a carrier, at the usual place of shipment, a quantity of hay, the fact that consignor had not paid or tendered the freight charges on such hay, in the absence of demand for prepayment, does not absolve the company from liability as carrier for damages thereto, since the usual custom is to collect the freight on delivery to the consignee, thereby waiving the right to prepayment.⁸¹ Where plaintiff delivered to defendant 1,700 pounds of rags securely tied in sacks but at the destination the company offered to deliver but 500 pounds of rags which were lying loose outside its depot, which plaintiff refused, in an action to recover for the value of the rags, there was not a sufficient tender of part of the freight to reduce defendant's liability to the value of the freight not tendered.⁸²

§ 8. Custody and control of goods.—Rights of carrier.—Action by carrier against third person.

Since a common carrier is a bailee for hire, it may resort to any means to protect the property that the owner could use, and may recover the full value from one who destroys it, though the owner might also have an action.⁸³ Since a common carrier is not absolved from liability to the owner of the goods by the torts of third persons, the carrier can sue for the wrong, a recovery by him being a bar to a subsequent action by the owner for the same injury.⁸⁴ A railroad having on its tracks a car of goods to be transferred to another road is a bailee, and may maintain an action for injury thereto.⁸⁵ Where a carrier who by mistake delivered cotton to a stranger had the right to sue in its own name in trover,

80. *Miami Powder Co. v. Port Royal & W. C. Ry. Co.*, *supra*.

81. *Evansville & T. H. R. Co. v. Keith*, 8 Ind. App. 57, 35 N. E. 296.

82. *Chicago & R. I. R. Co. v. Warren*, 16 Ill. (6 Peck) 502, 63 Am. Dec. 317.

83. *Pittsburg, etc., Ry. Co. v. City of Chicago*, 242 Ill. 178, 89 N. E. 1022, affg. judg. 144 Ill. App. 293.

84. *The Farmer v. McCraw*, 26 Ala. 189, 62 Am. Dec. 718.

85. *Chicago & A. R. Co. v. Kansas City Suburban Belt Line R. Co.*, 78 Mo. App. 245.

it could waive the tort and sue for value, without averment and proof of an assignment to it by the consignor of his interest.⁸⁶ After a shipper of goods consigned to shipper's order has elected to treat the property as converted on account of the carrier's wrongful refusal to deliver according to his order, and has notified the carrier of such election, he is under no obligation to defend suits relating to the property or to aid the carrier in disposing of it.⁸⁷ Where defendant ordered a car of corn through a broker, who ordered it from H., who shipped the corn, consigning it to himself; when the car had been placed on the switch at its destination, the broker opened the car and delivered the corn to defendant, who paid the broker for it; thereafter the railroad paid H. for the corn, the broker refusing to do so, and the railroad then sued defendant for conversion, the plaintiff was entitled to maintain the action.⁸⁸ If a person not the owner of property or entitled to its possession delivers it to a railroad for shipment, the true owner, who is no party to the contract, may, before delivery by the carrier, demand and reclaim his property, and, as against an action of trover brought for that purpose against the carrier by the true owner, it furnishes no defense that the carrier refused to recognize his title or right, and carried and delivered the property in accordance with the shipment.⁸⁹

§ 9. Actions for loss or injury.—Parties.

Shippers who are in control of merchandise shipped, and are both consignors and consignees, should be assumed, in the absence of evidence to the contrary to have sufficient title to enable them to maintain an action against the carrier. The merchandise being whale oil, the product of a whaling voyage, evidence that seamen on the whaling vessel "were interested in the oil" is not sufficient to establish that they are partners or joint owners, so as to require them to be joined as plaintiffs.⁹⁰ A consignor of goods to whom

86. *Johnson, Nesbitt & Co. v. Gulf & Chicago R. Co.*, 82 Miss. 452, 34 So. 357.

87. *Atchison, etc., Ry. Co. v. Schriver*, 72 Kan. 550, 84 Pac. 119, 4 L. R. A. (N. S.) 1056.

88. *Fordyce & Swanson v. Dempsey & Beasley*, 72 Ark. 471, 82 S. W. 493.

89. *Georgia R., etc., Co. v. Haas*, 127 Ga. 187, 56 S. E. 313.

90. *Swift v. Pacific Mail S. S. Co.*, 106 N. Y. 206, 12 N. E. 583.

the bill of lading was delivered afterwards notified the carrier not to deliver the goods to the consignee until he produced the bill of lading and paid a draft which the consignor had drawn on him. The consignor verbally assigned the bill of lading to the bank in whose favor the draft was drawn. The carrier delivered the goods to the consignee without the production of the bill of lading, and before the draft was paid. It was held that the consignor and the bank were properly joined as plaintiffs in an action against the carrier for the loss of the goods.⁹¹ An action for damage to a shipment was properly brought in tort jointly against the railway and the transportation company which contracted to ship the property.⁹²

§ 10. Actions for delay.—Nature and form.

Mere delay in transportation, when no demand for the return of the goods is made, does not constitute such a wrongful detention by a common carrier as will sustain an action of replevin against him.⁹³ Where the direction to the carrier is not to deliver the goods until payment shall be made by the consignee, the property in the goods continues in the consignor, who can sue for damage to the same caused by delay, either by an action on the case, or in assumpsit.⁹⁴ The owner of freight may not, because of delay of the carrier in delivering it, refuse to receive it, and sue the carrier for the value of the goods, though he has been obliged to buy other like goods; but he should accept it and sue for the damages.⁹⁵

91. *Hartwell v. Louisville & N. R. Co.*, 15 Ky. Law Rep. 778.

92. *Merchants' & Miners' Transp. Co. v. Eichberg*, 109 Md. 211, 71 Atl. 993.

93. *Wabash R. Co. v. House*, 101 Ill. App. 397.

94. *Spence v. Norfolk & W. R. Co.*, 92 Va. 102, 22 S. E. 815, 29 L. R. A. 578.

95. *Chicago, etc., Ry. Co. v. Albert Pfeifer & Bro.*, 90 Ark. 524, 119 S. W. 642, 22 L. R. A. (N. S.) 1107; *Chicago, etc., Ry. Co. v. Neusch*, 99

Ark. 568, 139 S. W. 679, he could not refuse to accept the shipment and sue as for a conversion.

Where a carrier of fruit delayed the transportation and failed to ice the car during transit, causing the fruit to rot, the refusal of the consignee to accept the fruit, of some value, when tendered for delivery at the point of destination, did not prevent him from bringing an action for damages. *St. Louis, etc., Ry. Co. v. Cumbie*, 101 Ark. 172, 141 S. W. 939.

§ 11. Actions for delay.—Conditions precedent.

Prepayment of freight is not necessary to sustain an action against a carrier for refusal to carry, and delay in carrying, freight, unless required by the carrier.⁹⁶ Unreasonable delay in transporting freight is an active breach of the carrier's contract, for which a recovery may be had without the formality of first putting the carrier in default, which is required only in case of purely passive breaches.⁹⁷

§ 12. Action against connecting carriers.—Nature and form.

In an action for loss of goods in shipment, the liability of the defendants, neither of whom was the initial carrier, and one was not the terminal carrier, was held to be at common law rather than under the Carmack Amendment of the Hepburn Act.⁹⁸ An action for money had and received will not lie against a delivering carrier of freight on account of an overcharge resulting from misrouting of a shipment by the initial carrier.⁹⁹ Where A. agreed with B., a common carrier, for the carriage of goods, and B., without the direction of A., agreed for the carriage with C., who without the knowledge or direction of A., agreed with D., a third carrier, it was held that A. might maintain an action against D. for not delivering the goods, and that by bringing the action he affirmed the contract made with him by C.¹ An action against a carrier, the petition in which alleged that the plaintiff made a shipment of potatoes from a station on defendant's line to a point on the line of another connecting carrier, that demand was made upon defendant to trace the freight and make a report to plaintiff as provided by the statute, that there was a failure to comply with such demand, and that suit was brought for the difference between the market value of the potatoes at the time and place when they should have been delivered and their value as delivered, was not an action for damages arising out of a breach of the con-

96. *Galena, etc., R. Co. v. Rae*, 18 Ill. (8 Peck) 488, 68 Am. Dec. 574.

97. *Berje v. Texas & P. Ry. Co.*, 37 La. Ann. 468.

98. *New York & B. Transp. Line v.*

Lewis Baer & Co., 118 Md. 73, 84 Atl. 251.

99. *Siggins v. Chicago & N. W. Ry. Co.* 153 Wis. 122, 140 N. W. 1128.

1. *Sanderson v. Lamberton*, 6 Bin. (Pa.) 129.

tract of carriage, nor from a breach of the common-law duty resting upon the carrier, but was based on the provisions of the Georgia Code 1910, requiring common carriers, on application by a shipper, to trace freight that has been lost, damaged or destroyed, and to inform applicant in writing within thirty days of the time, place, and manner of the loss, damage, or destruction, and the names of the person and their official position, if any, by whom such fact can be established, and that, on failure to do so, the carrier shall be liable for the value of the freight lost, damaged, or destroyed as if such loss, damage, or destruction had occurred on its own line.²

§ 13. Actions against connecting carriers.—Rights of action.

An action for loss of goods shipped could not be brought against a railroad company on its statutory liability as the last connecting carrier, where there were only two carriers concerned with the shipment, and the first was a steamship company.³ The right of a shipper, under the Oklahoma statute, to demand of a first carrier proof that loss of or injury to freight addressed to a point beyond its line, where it has been delivered to a connecting carrier, did not occur on its line, does not prohibit a shipper in the first instance without such demand from bringing an action for damages for an alleged loss or injury.⁴ Where a railroad company accepts a quantity of grain, and at a connecting point delivers it to a connecting line for transportation to the consignee, and at the point of connection an elevator company from whom the consignee purchased the grain assumes control of it, has the grain weighed, and sends the bill of lading with draft attached for an amount based upon a much larger weight than the weight of the grain, and the consignee pays the draft in order to secure the grain, the elevator company which was guilty of the negligence which caused the loss is liable, and not the initial carrier.⁵ Seizure of goods in the hands of a terminal carrier, under an attachment sued out

2. *Davis & Brandon v. Seaboard Air Line Ry.*, 136 Ga. 278, 71 S. E. 428.

3. *Central of Ga. Ry. v. Bashinski*, 8 Ga. App. 116, 68 S. E. 621.

4. *St. Louis & S. F. R. Co. v. McGivney*, 19 Okl. 361, 91 Pac. 693.

5. *Smith v. Illinois Cent. R. Co.*, 33 Pa. Super. Ct. 643.

by the buyer, is no defense to an action against the initial carrier for failure to deliver; the terminal carrier having made default in illegally stopping the car at the buyer's instance short of destination and permitting an inspection unauthorized by the bill of lading.⁶ Under the Georgia statute, providing for the tracing of freight that has been lost, damaged, or destroyed by the initial or any connecting carrier, fixing liability, etc., an action brought by the shipper is proper, though it appears that the shipper is not the owner of the goods.⁷ Where plaintiff was a stranger to the contract with the connecting carrier he was not entitled to recover for any loss or damage occurring after his consignee had accepted delivery from the initial carrier.⁸

§ 14. Actions against connecting carriers.—Parties.

An action for loss of a part of a shipment was properly brought in tort jointly against a connecting and terminal carrier of the goods.⁹ Where an intermediate carrier is sued for loss of freight on its line, it cannot complain because the initial carrier also liable is not made a party defendant.¹⁰ Under their pleading, shippers were held not to have waived their right to proceed, under the Carmack Amendment of June 29, 1906, to the Hepburn Act, by joining both the initial and terminal carriers as defendants.¹¹ A partnership among several carriers entering into a joint undertaking to carry particular freight is not essential to authorize recovery under the Missouri statute, permitting a plaintiff to unite as defendants, in an action for injury to freight, all carriers through whose hands the freight passed, and recover against the culpable defendant.¹² A receiver of a connecting carrier appointed more than two years after the delivery of the freight to the initial

6. *Perkett v. Manistee & N. E. R. Co.*, — Mich. —, 141 N. W. 607.

7. *Central of Ga. Ry. Co. v. Murphey*, 116 Ga. 863, 43 S. E. 265, 60 L. R. A. 817, *revd.* 196 U. S. 194, 25 Sup. Ct. 218, 49 L. Ed. 444.

8. *International & G. N. R. Co. v. Bingham* (Tex. Civ. App.), 89 S. W. 1113.

9. *New York & B. Transp. Line v. Lewis Baer & Son*, 118 Md. 73, 84 Atl. 251.

10. *Lacey v. Oregon R. & Nav. Co.*, — Or. —, 128 Pac. 999.

11. *Baltimore, etc., Ry. Co. v. William Sperber & Co.*, 117 Md. 595, 84 Atl. 72.

12. *Crockett v. St. Louis & H. Ry. Co.*, — Mo. App. —, 126 S. W. 243.

carrier for transportation is not a proper party to the action for the loss of the freight, in the absence of any allegation that the goods or any part thereof came into his possession, or into the possession of the connecting carrier, after his appointment.¹³ Since, if carriers were negligent in the handling of freight, they would be liable either to the consignor or consignee, they could be joined in a cross-action filed by a consignee against the consignor when sued for the price, and alleging the consignor's breach of contract and the railroad company's negligence in handling the cars shipped, especially where the pleadings made is doubtful whether the carriers' liability was to the consignor or consignee.¹⁴

§ 15. Actions for refusal to receive or transport goods.

In an action for failure to furnish cars, a complaint alleging that defendant is a common carrier operating lines of railroad, and that it held itself out to plaintiff as a through carrier to certain points beyond its lines by traffic arrangements with connecting carriers, is not objectionable in that it fails to allege any duty which defendant owed to plaintiff.¹⁵ A complaint alleging that plaintiff placed certain goods on defendant's side track for shipment, making a verbal demand on the agent of the defendant at the nearest station, and on those operating a local freight train on the division in question, for a suitable car for the shipment, and that plaintiff also wrote the train master two or three letters, is demurrable, in that it fails to show a demand on a person authorized to furnish cars; the complaint, further alleging that defendant neglected and refused to furnish plaintiff a car for the shipment of his goods, and that plaintiff loaded his goods in a car that had been ordered by some one else, and thereafter the car was negligently permitted to stand on the side track for five days, was, however sufficient, against a demurrer, to show a cause of action for negligent delay in shipping the goods.¹⁶ In an action against a railroad for failure to furnish cars to transport plaintiff's logs,

13. *Davies v. Texas Cent. R. Co.* (Tex. Civ. App.), 133 S. W. 295.

14. *Kemendo v. Fruit Dispatch Co.* (Tex. Civ. App.), 131 S. W. 73.

15. *Pittsburgh, etc., Ry. Co. v. Wood*, 45 Ind. App. 1, 88 N. E. 709, rehearing 84 N. E. 1009 denied.

16. *St. Louis, etc., R. Co. v. Moss*, 75 Ark. 64, 86 S. W. 828.

where the statute required the petition to contain a plain and concise statement of the facts constituting the cause of action, a petition, alleging that during the four months from July to October, inclusive, plaintiff offered for shipment 120,000 feet of oak logs of the value of \$1,920 and 60,000 feet of cypress logs of the value of \$840 from a certain station, and asked for cars, but that defendant railroad failed to furnish them, and that in consequence the logs became damaged, etc., stated a case for not furnishing cars to haul any of the logs during the months named; allegations of the value of the two species of logs and a depreciation in value during the period they lay at the station for lack of cars were sufficient to enable defendant to prepare its defense so far as the measure of damages was concerned, and it was not entitled to require plaintiff to allege the market prices either at such station or at the intended destination; plaintiff did not need to designate in his petition the character of cars required, defendant being presumed to know what kind were needed; and, where plaintiff did not know from the first that he could not ship, that after discovering such fact he continued to haul logs to the station was not a defense, but cause only for denying redress to the extent he increased his damages by accumulating logs after he knew that cars would not be available.¹⁷ In an action against a carrier for failure to furnish shipping facilities, a complaint alleging that defendant was a common carrier of grain, and that plaintiffs tendered grain for shipment and demanded "suitable cars" therefor, was not open to the objection that it did not allege the class of cars demanded; the absence of an allegation in the complaint that the defendant issued bills of lading obligating itself to carry goods to points beyond its own line was not necessary on the issue as to its holding itself out as a through carrier to such points, though such fact might be material to support the averment that it held itself out as a through carrier; and, the complaint alleging that the goods were tendered, and that plaintiffs were "willing, ready, and able to pay the charges thereon," it was not insufficient for failing to allege payment of the freight on the goods tendered, where there was no basis for computing the amount of the charges,

17. *Shoptaugh v. St. Louis & S. F. R. Co.*, — Mo. App. —, 126 S. W. 752.

as the quantity of grain to be shipped depended entirely on the number and capacity of the cars furnished by the carrier.¹⁸ A complaint in an action against a railroad company for its failure to furnish a car in which to ship plaintiff's timber, which does not allege that the timber was tendered to or received for shipment by an agent authorized to ship the same, or that the plaintiff applied for a car to an agent authorized to furnish cars, is demurrable though it alleges that the plaintiff placed the timber for shipment near the company's tracks at a certain station, and that he applied to a freight conductor and to the company's agents at other stations for a car.¹⁹ In an action against a carrier for failure to furnish cars, there is no variance between the allegation of a petition that

18. *Pittsburgh, etc., Ry. Co. v. Wood*, 45 Ind. App. 1, 84 N. E. 1009.

In an action for failure to furnish cars, the allegation in the complaint that shippers at certain points at which defendant must compete with other carriers were furnished cars for shipping to points to which plaintiff wished to ship, and that the number of cars so furnished was excessively out of proportion to the number furnished plaintiff, is sufficient to charge defendant with the duty of furnishing plaintiff with his proportion of cars to points on its own lines, or to points on connecting lines, to which defendant held itself out as through carrier. *Pittsburgh C. C. & St. L. Ry. Co. v. Wood*, 45 Ind. App. 1, 88 N. E. 709, rehearing 84 N. E. 1009 denied.

19. *St. Louis, etc., R. Co. v. Lee*, 69 Ark. 584, 65 S. W. 99.

A complaint in an action against a railway company for failure to furnish cars which alleges that property was tendered for shipment and that cars were demanded in a certain month is sufficiently definite as to the time when the demands were made, where the stations were small, so

that the company might ascertain whether such was the fact. *Choctaw, O. & G. Co. v. Rolfe*, 76 Ark. 220, 88 S. W. 870.

In an action against a carrier for failure to furnish cars to a shipper on demand for the transportation of timber, a complaint which alleges that the shipper placed saw logs along the carrier's tracks for shipment and made repeated demands for cars on which to ship them, and that the carrier neglected to furnish a sufficient number of cars, and that by reason thereof the logs deteriorated in value from exposure to the weather in a specified sum, and that by the carrier's negligent refusal to furnish cars the shipper was damaged, states a cause of action, the allegations being sufficient to show a tender for shipment and demand for cars; and sufficiently charges that the negligence of the carrier in failing to furnish cars was the proximate cause of the shipper's injury, as against the objection that the injury was due to the exposure of the logs to the weather; and the allegation that the shipper had made demand of the carrier for cars was sufficient to admit

plaintiff had on hand at a station for shipment in the month of July a stated quantity of logs, that he demanded cars to load them, and that the carrier failed to furnish cars, and the proof that the logs remained at the station until November, while plaintiff was vainly requesting cars, the date alleged in the petition being immaterial; and, where the evidence showed usage recognized by the carrier of notifying its conductors to furnish cars when goods were ready to be shipped, and that plaintiff had notified the conductors to furnish cars, and had also notified a commercial freight agent to furnish cars, an instruction that, unless plaintiff notified the carrier's superintendent that goods were ready for shipment there could be no recovery, was properly refused.²⁰ In an action under the railroad demurrage law for failure to furnish cars, an answer setting forth that defendant had a large amount of equipment unused during all the period of ordinary business, that in the fall there was an unusually heavy traffic, that at the time of application of plaintiff for cars the demand for cars was exceptional, that defendant had apportioned its equipment equitably so that every portion of its line had a just share thereof, and that plaintiff was furnished with cars at the earliest dates at which defendant could furnish them, consistent with its duty to furnish all applicants equally, states a good defense.²¹ Where a shipper tendered to a carrier perishable goods for shipment, which its station agent refused to accept, because of a personal dispute between himself and the shipper, and the latter left the goods, after the refusal, with instructions to the agent to ship them, the shipper was entitled to recover the value of the goods, if he left them believing they would be shipped; but, if to impose a liability on the carrier, knowing they would be lost, he could not recover.²² A suit to compel an interstate carrier to receive and transport property tendered for shipment is one to enforce performance of a duty imposed by general law, and within the jurisdiction of the

proof as to the agent on whom demand was made, and that he had authority to furnish the cars. *St. Louis, I. M. & S. R. Co. v. Wynne Hoop & Cooperage Co.*, 81 Ark. 373, 99 S. W. 375.

20. *Hoffman Heading & Stave Co. v. St. Louis, etc., Ry. Co.*, 119 Mo. App. 495, 94 S. W. 597.

21. *Martin v. Great Northern Ry. Co.*, 110 Minn. 118, 124 N. W. 825.

22. *Lanning v. Sussex R. Co.*, 1 N. J. Law J. 21.

courts, and the complainant is not required to resort in the first instance to the Interstate Commerce Commission.²³ That a shipper suing for the failure of a carrier to furnish cars for the shipment of hay could have secured cars in subsequent months, and that the market was as good as when cars were demanded and refused, did not limit his recovery to nominal damages.²⁴ Under a statute providing a penalty, to be recovered by the party aggrieved, in case of refusal of a carrier to take and transport a passenger or property, the shipper, and not a connecting carrier to whom freight is consigned, is the party to sue for the penalty.²⁵ One sustaining loss by a carrier's refusal to transport freight on stipulated rates may recover loss sustained on contracts made on the faith of such rates.²⁶ Where one failed to deliver cars at a certain place as contracted for, the measure of damages would be such a sum as would compensate the other party for the damage sustained by him from such failure.²⁷ Instructions that the measure of damages for a railroad company's failure to furnish mine-owner cars was the difference between the cost of mining and the selling price were erroneous because they should have taken into account the value of the coal left in the ground.²⁸ In an action against a carrier for the value of lumber which had been ordered by a customer from plaintiff, but which became a total loss because of the carrier's failure to accept it for transportation, a nonsuit was properly granted, where the execution of the written order for the lumber was not proven.²⁹ The failure of plaintiff, in an action against a railroad for failure to furnish cars, to allege an express contract, does not bring the case within the Minnesota Reciprocal Demurrage Law, and a recovery may be had without alleging any written demand for the cars.³⁰ A statute, providing for the fixing

23. *Louisville & N. R. Co. v. F. W. Cook Brewing Co.*, 172 Fed. 117, 96 C. C. A. 322.

24. *St. Louis S. W. Ry. Co. v. Leder Bros.*, 87 Ark. 298, 112 S. W. 744.

25. *Crosby v. Pere Marquette R. Co.*, 131 Mich. 288, 91 N. W. 124, 9 Detroit Leg. N. 310.

26. *Louisville & N. R. Co. v. Higdon*, 149 Ky. 132, 148 S. W. 26.

27. *Williams v. Armour Car Lines*, 7 Pen. (Del.) 275, 79 Atl. 919.

28. *Illinois Cent. R. Co. v. River & Rail Coal & Coke Co.*, 150 Ky. 489, 150 S. W. 641.

29. *Kent & Downs v. Wadley Southern Ry. Co.*, 136 Ga. 857, 72 S. E. 413.

30. *Zetterberg v. Great Northern Ry. Co.*, 117 Minn. 495, 136 N. W. 295.

of reasonable rules by the Railroad Commission of a time within which cars shall be furnished by a carrier after written application, and fixing a penalty per day per car to be paid by the carrier for failure to supply cars accordingly, does not abrogate the common law action for damages to a shipper by reason of a breach of the carrier's common law duty to furnish cars for transportation of freight within a reasonable time.³¹ Where a manufacturer of a monument agreed to furnish and set up a soldier's monument for which an association agreed to pay \$1,500; a carrier in carrying the monument rendered special service pursuant to an arrangement with the association at a cost of \$700 and refused to carry the same in the regular course of business; the manufacturer objected to the special arrangement or special service; the carrier could have delivered the monument in time by rendering regular service at a cost of a few dollars; the association, on receiving the monument, paid the carrier \$1,500, and the carrier retained for its special services \$700, the manufacturer was held entitled to a recovery of the \$700, based on a breach of the duty of the carrier and a wrongful interference with the rights of the manufacturer, and the fact that the carrier transported the property of the manufacturer, as it was bound to do, and delivered it in good order, did not afford a complete answer to the manufacturer's claim for damages.³² In an action against a common carrier for failure to furnish cars to ship timber, where the defense was made that there was an unusual volume of traffic, plaintiff was properly allowed to prove by other shippers that in the seasons preceding the one in question there was a car shortage on defendant's road, in the district from which plaintiff was shipping; where the evidence showed that the defendant at no time notified plaintiff that it could not furnish cars because of an unexpected rush of business, but encouraged him in getting out his timber and promised to furnish cars to ship it, a declaration of law that if there was a sudden and unexpected increase in defendant's business, or if high water delayed defendant in handling its business, it was not liable whether it notified plaintiff of its condition or not was

31. *Southern Ry. Co. v. Moore*, 133 Ga. 806, 67 S. E. 85.

32. *Harrison Granite Co. v. Pennsylvania R. Co.*, 145 Mich. 712, 108 N. W. 1081, 13 Detroit Leg. N. 631.

more liberal to defendant than was justified; and where the uncontradicted evidence showed that defendant agreed to furnish at least one car a day and several times told plaintiff that cars would be furnished, and that when he inquired as to the situation and notified defendant that he was keeping a large crew of men on hand at a large expense to have them ready to load cars, defendant notified him that the cars would be furnished, the court was justified in refusing to declare as matter of law, that there was no evidence of an agreement to furnish cars.³³ A dealer cannot recover damages for a carrier's refusal to transport coal arising from his contract to buy the coal to be carried, where the amount of coal to be delivered was optional with the seller, and it does not appear that the dealer made any contracts for resale on the faith of it that caused him loss; but, as to another agreement binding the seller to deliver a specified amount, the dealer can recover the enhanced cost of delivering coal under contracts for resale made on the strength of such agreement.³⁴ Where plaintiff sought to establish his banana business in Central America, and expended considerable money in his plant, it was engaged in foreign commerce when it began to move men, material, and supplies to and from the United States to Central American ports in furtherance of its business, and was therefore entitled to compel defendant to furnish transportation facilities on the same terms that defendant furnished such facilities to others.³⁵ Whether a carrier unreasonably neglected to provide a sufficient number of cars to forward freight is a question for the jury.³⁶ The rule that whether a carrier negligently failed to supply cars when demanded is for the jury applies only where a specified and definite notice of the time when the cars are required is shown.³⁷ In an action against a carrier for failure to furnish plaintiff with cars, the evidence was held sufficient to make it a question for the jury whether there was such a sudden and unusual increase of business

33. *Cronan v. St. Louis & S. F. R. Co.*, 149 Mo. App. 384, 130 S. W. 437.

34. *Crescent Coal Co. v. Louisville & N. R. Co.*, 143 Ky. 73, 135 S. W. 768.

35. *American Banana Co. v. United Fruit Co.*, 160 Fed. 184.

36. *Strough v. New York Cent. etc., R. Co.*, 92 App. Div. 584, 87 N. Y. Supp. 30, *affd.* 181 N. Y. 533, 73 N. E. 1133.

37. *Di Giorgio Importing & Steamship Co. v. Pennsylvania R. Co.*, — Md. —, 65 Atl. 425.

and demand for cars over defendant's road as to release it from its liability for failure to furnish cars.³⁸ Whether defendant, a carrier, with knowledge of all the facts, interfered with plaintiff's shipment of a monument over its line by refusing its regular service which would have been adequate to deliver the monument by the date provided for in plaintiff's contract with the purchasers, and shipped by special service at much greater expense, which had to be paid from the fund provided for the purchase of the monument, and hence ultimately by plaintiff, was a question for the jury.³⁹ Where a shipper based his action against a carrier upon its failure to furnish cars on a given date alleged to be a reasonable time after a demand, a charge authorizing a recovery for failure to furnish cars in a reasonable time generally was erroneous as submitting an issue not pleaded.⁴⁰

38. *Dillender v. St. Louis & S. F. R. Co.*, 149 Mo. App. 331, 130 S. W. 107. *Pennsylvania R. Co.*, 154 Mich. 48, 117 N. W. 549, 15 Detroit Leg. N. 683.

40. *Galveston, etc., R. Co. v. Word*

39. *Harrison Granite Co. v. Penn- (Tex. Civ. App.)*, 124 S. W. 478.

CHAPTER VII.

LIABILITY FOR LOSS OR DAMAGE.

- SECTION**
1. Liability of carrier for loss or damage.
 2. Distinction between act of God and inevitable accident.
 3. Loss or damage by act of God, vis major, or inevitable accident.
 4. Proximate cause of loss or injury.
 5. Loss or injury by the public enemy.
 6. Seizure under legal process. Attachment.
 7. Seizure under legal process. Garnishment.
 8. Seizure under police regulations.
 9. Duty of carrier after disaster.
 10. Loss or injury from inherent nature of goods.
 11. Care required of carrier in general.

§ 1. Liability of carrier for loss or damage.

The liability of a carrier of goods is that of a common carrier, which is that of an insurer; and in cases of loss of or injury to goods intrusted to it for transportation no excuse avails such carrier, except that such loss or injury was occasioned by the act of God, or the public enemies of the State, or the sole fault of the owner or his agent.¹ The law adjudges the carrier responsible, irrespective of any question of negligence or fault on his part, if the loss does not occur by the act of God or the public enemies. With these exceptions, the carrier is an insurer against all losses.²

1. *McCarthy v. Louisville, etc., R. Co.*, 102 Ala. 193, 48 Am. St. Rep. 29, 14 So. 370, 61 Am. & Eng. R. Cas. 178; *Central of Ga. R. Co. v. Lippman*, 110 Ga. 665, 36 S. E. 202, distinguishing *Phillips v. Railroad Co.*, 93 Ga. 356, 20 S. E. 247 *Boyd v. Spencer*, 103 Ga. 828, 30 S. E. 841; *Southern Ry. Co. v. Barlow*, 104 Ga. 213, 30 S. E. 732; *Central of Ga. R. Co. v. Ricks*, 34 S. E. 570, 109 Ga. 339.

See Liability of the common carrier, § 2, chap. 2.

2. *Merritt v. Earle*, 29 N. Y. 115; *Heyman v. Stryker*, 116 N. Y. Supp. 638.

An agreement by a railroad to transport goods from one station to another within a certain time does not make the carrier an absolute insurer of the goods, but their destruction within the prescribed time by an act of God will excuse non-delivery.

The exceptions to this rule of liability are given in the chapter on common carriers and are considered in the subsequent sections of this chapter. For example, a common carrier is liable for the loss of goods by fire, unless the fire was caused by the act of God, the public enemy, or the inherent quality of the goods.³ Usually in an action for the loss of or injury to goods shipped to be delivered in another State, the law of the place of shipment is held to govern,⁴ unless the parties contracted with reference to some other law.⁵ But it has been held otherwise in some jurisdictions.⁶

§ 2. Distinction between "Act of God" and "Inevitable Accident."

The expressions "act of God" and "inevitable accident" have a distinction in meaning, although they are sometimes used in a similar sense, and as synonymous or equivalent terms.⁷ That may be an "inevitable accident" which no foresight or precaution of the carrier could prevent; but the phrase "act of God" denotes natural necessity, that which arises from natural causes, natural accidents that could not happen by the intervention of man, such as storms, lightning, and tempests. The expression excludes all human agency.⁸ If the loss or injury happen in any way through

Sauter v. Atchison, etc., R. Co., 78 Kan. 331, 97 Pac. 434.

3. *Farley v. Lavary* (Ky.), 54 S. W. 840. See *Common Carriers*, chap. 2; *Limitation of liability*, chap. 10.

4. *Liverpool, etc., Steam Co. v. Insurance Co.*, 129 U. S. 397, 32 L. Ed. 788, 9 S. Ct. 469; *Hale v. New Jersey Steam Nav. Co.*, 15 Conn. 539, 39 Am. Dec. 398; *McDaniel v. Railway Co.*, 24 Iowa, 412; *Talbott v. Transportation Co.*, 41 Iowa, 247; *Fairchild v. Railroad Co.*, 148 Pa. 527, 24 Atl. 79; *Cantu v. Bennett*, 39 Tex. 303.

5. *In re Missouri Steamship Co.*, L. R. 42 Ch. Div. 321.

6. Where a package is delivered to

a carrier in New York to be delivered in Ohio, and is negligently lost, in an action for such loss the place of delivery is the place of the performance of the contract, and the law of Ohio governs. *Jacobson v. Adams Express Co.*, 1 O. C. D. 212.

7. *Neal v. Saunderson*, 2 Sm. M. (Miss.) 572, 41 Am. Dec. 609; *Walpole v. Bridges*, 5 Blackf. (Ind.) 222; *Fowler v. Davenport*, 21 Tex. 626.

8. *Merritt v. Earle*, 29 N. Y. 115, 86 Am. Dec. 292; *Proprietors Trent, etc., Nav. Co. v. Wood*, 4 Dougl. 297, 26 E. C. L. 479, 3 Esp. 127, 1 T. R. 28 note; *Forward v. Pittard*, 1 T. R. 27, 1 Rev. Rep. 142; *New Brunswick*

the agency of man it cannot be considered the act of God; nor even if the act or negligence of man contributes to bring or leaves the goods of the carrier under the operation of natural causes that work their injury, is he excused. To excuse the carrier the act of God, or *vis divina*, must be the sole and immediate cause of the injury. If there be any cooperation of man, or any admixture of human means, the injury is not in a legal sense the act of God.⁹ Where the common law rule applies under which no excuse avails a common carrier in cases of loss, unless occasioned by the act of God or the public enemy, if a locomotive engineer leaves his train and proceeds with his engine to a water tank, taking the conductor with him, and, on returning to where the cars were, causes the engine to run at a dangerous speed, wrecking one of the cars and causing the loss of property being transported, the loss is not the act of God, within the meaning so as to excuse the carrier, if the engineer were insane at the time.¹⁰

§ 3. Loss or damage by act of God, vis major, or inevitable accident.

A common carrier, to exempt itself from liability for loss of or injury to goods received for transportation, must show that no act or neglect of it concurred in or contributed to the loss or injury; if in consequence of its departure from the line of its duty, the goods be lost or injured by the act of God, it is not excused.¹¹

Steamboat, etc., Transp. Co. v. Tiers, 24 N. J. L. 697, 64 Am. Dec. 394; Stockton Lumber Co. v. California Nav. & Imp. Co., 10 Cal. App. 197, 101 Pac. 541, an irresistible superhuman cause; Georgia, etc., R. Co. v. Barfield, 1 Ga. App. 203, 58 S. E. 236; Carpenter v. Baltimore & O. R. Co., 6 Pen. (Del.) 15, 64 Atl. 252.

9. Michaels v. New York Cent. R. Co., 30 N. Y. 564; Merritt v. Earle, 31 Barb. (N. Y.) 38, 29 N. Y. 115; McArthur v. Sears, 21 Wend. (N. Y.) 190; Campbell v. Moore, 1 Harp. (S.

C.) 468; McHenry v. Railroad Co., 4 Harr. (Del.) 448.

10. Central of Ga. Ry. Co. v. Hall, 124 Ga. 322, 52 S. E. 679.

11. Michaels v. New York Cent. R. Co., 30 N. Y. 564; Read v. Spaulding, 30 N. Y. 630, 5 Bos. (N. Y.) 395; Dunson v. New York Cent. R. Co., 3 Lans. (N. Y.) 265; Wing v. New York, etc., R. Co., 1 Hilt. (N. Y.) 235; Southern Ry. Co. v. Smith, 31 Ky. Law Rep. 243, 102 S. W. 232; Jones v. Minneapolis, etc., R. Co. (Minn.), 97 N. W. 893.

Where a carrier needlessly delays a shipment or negligently fails to protect it from threatened danger, and the goods are overtaken in transit and destroyed by act of God and such negligence is the proximate cause of the injury, the carrier is liable whether the goods are perishable or not.¹² A common carrier is not exempt from liability by a loss occasioned by an act of God if such carrier has been guilty of any previous negligence which brings the property in contact with the destructive force or unnecessarily exposes it thereto.¹³ Where goods are injured or destroyed by providential causes while in the possession of a carrier in default, the carrier is liable, since its default is an operative cause concurrent with the act of God.¹⁴ Where the results or natural consequences of an act of God may be foreseen and guarded against, by the exercise of reasonable diligence, prudence, and foresight, a failure to do so would be negligence, and subject the carrier to damages, although the original cause was an act of God.¹⁵ A loss arising from an accidental fire, or conflagration of a city, without any default

The carrier has the burden of proof to show that it used every reasonable effort to avoid the effects of an inevitable accident. *Richmond, etc., R. Co. v. White*, 88 Ga. 805, 55 Am. & Eng. R. Cas. 682; *Columbus, etc., R. Co. v. Kennedy*, 78 Ga. 646.

A railroad company transported goods to destination and notified the owner to take them away. In response the owner promptly called at the depot, tendered the charges due and demanded the delivery of the goods, which demand the railroad company refused. The next day an unprecedented flood occurred which damaged the goods. *Held*, that the company having refused the owner's demand and wrongfully detained the goods, held them at its own risk, and was responsible for the damage caused by the flood. *Henry v. Atchi-*

son, etc., R. Co., 83 Kan. 104, 109 Pac. 1005.

12. *Alabama G. S. R. Co. v. Quarles & Conturie*, 145 Ala. 436, 40 So. 120, 5 L. R. A. (N. S.) 867, 117 Am. St. Rep. 54, property destroyed by a cyclone; *Sunderland Bros. Co. v. Chicago, etc., R. Co.*, 89 Neb. 660, 131 N. W. 1047.

13. *Tate v. Missouri Pac. Ry. Co.*, 157 Ill. App. 105.

14. *Central of Ga. Ry. Co. v. Sigma Lumber Co.*, 170 Ala. 627, 54 So. 205.

15. *Cunningham v. Pennsylvania R. Co.*, 40 Pa. Super. Ct. 212; *Lang v. Pennsylvania R. Co.*, 154 Pa. St. 342, 32 W. N. C. (Pa.) 205, 2 Pa. Dist. Rep. 125, the loss of whiskey on a train wrecked by a flood cannot be attributed to an inevitable accident, so as to relieve the carrier from liability, where the

whatever on the part of the carrier, and not occasioned by lightning or some operation of nature, does not excuse the carrier from liability for loss of goods in its custody, for such loss does not fall within the exception as an act of God.¹⁶ A flood which no human power could stay and no prudence or foresight anticipate, or an extraordinary or unprecedented or overwhelming flood which could not have been reasonably foreseen, is an act of God which will relieve a carrier who is free from negligence from liability for

whiskey was not destroyed by the flood, but part of it was stolen without any attempt of the trainmen to prevent it, and the remainder destroyed by a volunteer guard of citizens in order to prevent it from falling into the hands of the dangerous class of men who were determined to capture it. *Adams Express Co. v. Jackson*, 92 Tenn. 326, 21 S. W. 666, an express company which, knowing of the interruption of its route by the act of God, such as an unprecedented flood, undertakes to carry out its prior contract to transport horses, is liable for injuries to them while they are being transported by another express company to which it delivers them at the point of interruption, caused by delay and their being frightened and thrown down by the backing and switching of cars in which they are carried, especially where it could have procured ample facilities for rapid and safe transit over other lines. *Ladd v. Foster*, 31 Fed. 827, where through the negligence of those in charge of a ferry boat, it turned over on its side, and then righted with the cabins full of water and a passenger jumped out of a

window and struck a cable, which, but for the negligence aforesaid, would not have been in the way, the facts were held to justify a recovery in an action by the passenger's administrator.

16. *Miller v. Steam Navigation Co.*, 10 N. Y. 431, Seld. Notes (N. Y.) 64; *Parsons v. Monteath*, 13 Barb. (N. Y.) 353; *Gould v. Hill*, 2 Hill (N. Y.) 623; *Goold v. Chapin*, 10 Barb. (N. Y.) 612, 20 N. Y. 259; *Gilmore v. Carman*, 1 Sm. & M. (Miss.) 279, 40 Am. Dec. 96; *Chevalier v. Straham*, 2 Tex. 115, 47 Am. Dec. 639; *Forward v. Pittard*, 1 T. R. 27, 1 Rev. Rep. 142; *Scott County Milling Co. v. St. Louis, etc., R. Co.*, 127 Mo. App. 80, 104 S. W. 924.

Act of God means something superhuman, or something in opposition to the act of man. Loss by fire, as in the great Chicago fire of 1871, therefore, will not relieve a carrier from his undertaking. *Merchants' Dispatch Co. v. Smith*, 76 Ill. 542.

A common carrier is not liable for injury to property in transportation, caused entirely by an earthquake, and unaccompanied by negligence on its part. *Slater v. South Carolina R. Co.*, 29 S. C. 96, 6 S. E. 936.

damage by the flood to goods in his custody.¹⁷ A carrier is liable for loss of freight from a flood, if it was aware of its approach in time to remove the goods to a place of safety by the exercise of

17. *Ala.*—*Smith v. Western R. Co.*, 91 *Ala.* 455, 8 *So.* 754, 24 *Am. St. Rep.* 429, 49 *Am. & Eng. R. Cas.* 210, 11 *L. R. A.* 619.

Fla.—*J. C. Williams & Co. v. Pensacola, etc.*, 57 *Fla.* 544, 48 *So.* 630.

Ga.—*Wallace v. Clayton*, 42 *Ga.* 443.

Kan.—*Atchison, etc., R. Co. v. Henry*, 78 *Kan.* 490, 97 *Pac.* 465, 18 *L. R. A. N. S.* 177.

Mo.—*Lightfoot v. St. Louis, etc., R. Co.*, 126 *Mo. App.* 532, 104 *S. W.* 482, carrier is not liable notwithstanding negligible delay of the carrier in transporting the goods, where by they were exposed to the flood; *Wertheimer, Swartz Shoe Co. v. Missouri Pac. R. Co.*, 147 *Mo. App.* 489, 126 *S. W.* 793; *Elam v. St. Louis, etc., R. Co.*, 131 *Mo. App.* 115, 110 *S. W.* 601, 117 *Mo. App.* 453, 93 *S. W.* 851. See *Edwards v. Lee*, 147 *Mo. App.* 38, 126 *S. W.* 144.

While a carrier is responsible for an injury caused by the concurrence of its negligence with an act of God, yet such injury must be a natural and probable consequence of the negligence and not an unusual and unanticipated consequence, such as an injury to goods caused by an unprecedented and unforeseen flood, to which the carrier's negligent delay in moving the goods subjected them. *Moffatt Commission Co. v. Union Pac. R. Co.*, 113 *Mo. App.* 544, 88 *S. W.* 117.

Tex.—*Fentiman v. Atchison, etc.,*

R. Co., 44 *Tex. Civ. App.* 455, 98 *S. W.* 939.

The Johnstown flood of 1889, which was of such extraordinary character that a party was not bound to anticipate or provide against it, and which came with such suddenness and power that escape from it was impossible, was an inevitable accident or act of God in respect to the loss of baggage on a railroad train, where utmost care was exercised by the agents and employes of the carrier to escape the dangers of which they had knowledge or which they had reasonable ground to apprehend. *Long v. Pennsylvania R. Co.*, 147 *Pa. St.* 343, 30 *Am. St. Rep.* 732, 14 *L. R. A.* 741, 23 *Atl.* 459, 29 *W. N. C.* 375. But the carrier was not exempt from liability for a loss which took place because of the act of God, if the carrier had been guilty of any previous negligence or misconduct, such as unnecessary delay, which subjected the goods in its possession to a loss by the act of God which they would not otherwise have met with. *Wald v. Pittsburg, etc., R. Co.*, 162 *Ill.* 545, 44 *N. E.* 888, 53 *Am. St. Rep.* 332, 35 *L. R. A.* 356, 5 *Am. & Eng. R. Cas. N. S.* 70.

The flood on May 20 and 31, 1903, at the junction of the Kaw and Missouri rivers, at Kansas City, Mo., was an act of God, and a carrier was not liable for loss of freight in such a flood, though it was negligent in not getting the car containing plain-

ordinary care and diligence.¹⁸ A common carrier is responsible for injuries to freight by a flood, where at the date the goods were delivered the officer in charge of the United States Weather Bureau notified all railroad companies of the coming flood and warned them to guard their property in the low lands, and the carrier exposed the goods negligently to injury, and it cannot in such case plead the act of God as a defense.¹⁹ Where a carrier negligently delays a shipment of goods, so that it is destroyed by an act of God which would not have destroyed it, except for the delay, the carrier is liable.²⁰ An act of God which will excuse a common carrier for loss of goods is such an inevitable accident as cannot be prevented by human care, skill, or foresight, but results from natural causes, such as lightning, tempests, floods, etc.²¹ A snow storm or blizzard of such violence as to prevent the moving of trains is an act of God which will exempt a carrier from liability for loss of or damage to property shipped, occasioned thereby without the carrier's fault.²² A carrier is not liable for injury to prop-

tiff's goods out of its freight yards before the destructive part of the unprecedented flood, constituting an act of God, came, unless it was warned of the approach, not merely of a rise in the river, but of the flood. *Merritt Creamery Co. v. Atchison, etc., R. Co.*, 139 Mo. App. 149, 122 S. W. 322.

The carrier was not liable for the loss of property in shipment through the act of God, which could not reasonably have been foreseen, although, but for its previous negligence, by which the shipment was delayed, the property would have escaped the danger, and the loss would not have occurred. *Empire State Cattle Co. v. Atchison, etc., R. Co.*, 135 Fed. 135; *Minnesota, etc., Cattle Co. v. Atchison, etc., R. Co.*, 135 Fed. 135.

18. *Pinkerton v. Missouri Pac. R. Co.*, 117 Mo. App. 288, 93 S. W. 849.

19. *Wabash R. Co. v. Sharpe*, 76 Neb. 424, 107 N. W. 758.

20. *Green-Wheeler Shoe Co. v. Chicago, etc., R. Co.*, 130 Iowa 123, 106 N. W. 498, 5 L. R. A. (N. S.) 882.

21. *Carpenter v. Baltimore & O. R. Co.*, 6 Pen. (Del.) 15, 64 Atl. 252.

22. *Jones v. Minneapolis, etc., R. Co.*, 91 Minn. 229, 103 Am. St. Rep. 507, 97 N. W. 893; *Herring v. Chesapeake, etc., R. Co.*, 101 Va. 778, 45 S. E. 322; *Ballentine v. North Missouri*, 40 Mo. 491, 93 Am. Dec. 315; *Black v. Chicago, etc., R. Co.*, 30 Neb. 197, 46 N. W. 428, 1 Neb. L. J. 30. These were cases of loss or injury to cattle while in transit from exposure to severe weather. See *Texas & P. R. Co. v. Smissen*, 31 Tex.

erty resulting from a sudden and severe whirlwind the like of which had not previously occurred in the locality,²³ or for the loss of goods destroyed by fire caused by a furious wind which blows a car from the track and overturning it causes it to be set afire;²⁴ but where the proximate cause of the burning was a sudden gust of wind diverting the course of a distant fire so as to drive the flames in the direction of and upon the carrier's warehouse which was destroyed, such fire, though accidental, was not the act of God, so as to excuse a common carrier for the destruction of goods in his charge.²⁵ A sudden failure of the wind causing the wreck of a vessel has been held to be an act of God.²⁶ But an injury is not attributable to an act of God, but to neglect, where, for example, it is caused by the fall of a sign in a wind such as might be expected in the regular course of the season,²⁷ or by a landslide caused by a rain of not unusual violence.²⁸ But the mere fact that a railroad was constructed close to a highway, and the injury was caused by that proximity, did not constitute negligence, although defendant might have built another road farther off, which would have been perfectly safe.²⁹ An extraordinary or unprecedented storm, flood, or other unavoidable casualty caused by the hidden forces of nature unknown to common experiences, and which could not have reasonably been anticipated by that degree of engineering skill and experience required in the prudent construction of a railroad, or which the ordinary safeguards provided by the carrier

Civ. App. 549, 73 S. W. 42, holding that severe cold and snow in December in Missouri was not "an act of God" which excused the carrier from liability.

23. *Gulf, etc., R. Co. v. Compton*, (Tex. Civ. App.), 38 S. W. 220.

24. *Blythe v. Denver, etc., R. Co.*, 15 Colo. 333, 22 Am. St. Rep. 403, 25 Pac. 702, 11 L. R. A. 615.

25. *Miller v. Steam Navigation Co.*, 10 N. Y. 431, Seld. Notes (N. Y.)

64. See *Hollister v. Nowlen*, 19 Wend. (N. Y.) 234.

26. *Colt v. McMechen*, 6 Johns. (N. Y.) 160, 5 Am. Dec. 200.

27. *St. Louis, etc., R. Co. v. Hopkins*, (Ark.) 15 S. W. 610, 12 L. R. A. 189.

28. *Gleeson v. Virginia Midland R. Co.*, 140 U. S. 435, 35 L. Ed. 458, 11 Sup. Ct. Rep. 859, 44 Alb. L. J. 33.

29. *Beatty v. Central Iowa R. Co.*, 58 Iowa 242, 8 Am. & Eng. R. Cas. 210.

are wholly insufficient to withstand the effects of, must be regarded as an unavoidable or inevitable accident, *vis major*, or an act of God, which will not render the carrier liable for the damages, where such unprecedented storm is the proximate cause of the injury.³⁰ In order to charge the carrier with goods lost in an unprecedented storm, plaintiff must show that by ordinary prudence it could have protected the goods after becoming aware of the impending danger.³¹ Interruption to navigation by frost or ice, the freezing up of canals, rivers, or other means of water transportation, is an act of God which will exonerate the carrier from losses occurring from such causes, where no fault is imputable to the carrier.³² The carrier is not responsible for a loss

30. *Libby v. Maine Central R. Co.*, (Me.) 26 Atl. 943, where an extraordinary unprecedented storm which came suddenly and lasted about two hours, caused the washout of a railroad culvert which was insufficient to carry off one-third of the water which fell, although it had proved sufficient for more than forty years; *Herring v. Chesapeake, etc., R. Co.*, (Va.) 45 S. E. 322; *Columbus, etc., R. Co. v. Bridges*, 86 Ala. 448, 11 Am. St. Rep. 58, 38 Am. & Eng. R. Cas. 136; *The Thomas Newton*, 41 Fed. 106; *American Express Co. v. Smith*, 33 Ohio St. 511, 31 Am. Rep. 561; *Philadelphia, etc., R. Co. v. Anderson*, 94 Pa. St. 351, 39 Am. Rep. 787; *Chicago, etc., R. Co. v. Manning*, 23 Neb. 552, 35 Am. & Eng. R. Cas. 618; *Withers v. North Kent R. Co.* 3 H. & N. 969; *Louisville, etc., R. Co. v. Thompson*, 107 Ind. 442, 57 Am. Rep. 120, 27 Am. & Eng. R. Cas. 88; *Coosa River Steamboat Co. v. Barclay*, 30 Ala. 120 See also, *Excuses for delay*, § 10, chap. 8.

31. *International, etc., R. Co. v. Bergman*, (Tex. Civ. App.) 64 S. W.

999, where it appeared that the place of storage was safe under usual conditions, and that, though possible to have delivered them on the morning of the storm, the bad weather deterred the drayman and it did not appear that there was any safer place after the danger became apparent, the company was not liable.

What is not a sufficient defense.—Where the motion to set aside a default judgment in an action against a carrier for goods destroyed in transportation did not state that the flood causing the damage was unprecedented, but that it was an extraordinary and unusual rainfall or flood, it was properly overruled, since it did not state a sufficient defense; it being the duty of railroads in constructing their roadbeds to guard against floods which may be anticipated, though some may be extraordinary and unusual. *Missouri, etc., R. Co. v. Davidson*, 25 Tex. Civ. App. 134, 60 S. W. 278.

32. *West v. The Berlin*, 3 Iowa, 552; *Bork v. Norton*, 2 McLean (U. S.) 423; *Bowman v. Teal*, 23 Wend. (N.

caused by the breaking of a rail caused by the exceeding cold weather which is the result of a *vis major* against which no prudence could have guarded.³³ The freezing of goods of a perishable nature while en route is the act of God, for which the carrier is not liable, unless caused by unnecessary delay in transporting them, or their careless exposure to the cold.³⁴ To render a common carrier liable for the destruction of goods by freezing while in transit, under a bill of lading exempting it from damages for freezing, it must not only be guilty of unreasonably delaying transportation, but the goods must have been frozen during the delay and because of it.³⁵ The carrier is liable where the goods are frozen owing to its negligence in shipping promptly at a season of the year when a freezing spell might reasonably be anticipated;³⁶ but it is not liable, where fruit, for example, was delivered to it for shipment when the temperature was below freezing point, for negligence in forwarding the fruit on the day of receipt,

Y.) 306; *Parsons v. Hardy*, 14 Wend. (N. Y.) 215; *Harris v. Rand*, 4 N. H. 259; *Crosby v. Fitch*, 12 Conn. 410.

33. *McPadden v. New York Cent. R. Co.*, 44 N. Y. 478, 4 Am. Rep. 705.

34. *Vail v. Pacific R. Co.*, 63 Mo. 230, and the burden was held to be on the owner to show such careless exposure; *Wolf v. American Express Co.*, 43 Mo. 422, 97 Am. Dec. 406; *Swetland v. Boston, etc., R. Co.*, 102 Mass. 276, a conductor whose freight train is obstructed by a snow storm so that he must leave a part of the cars without shelter, is not bound as a matter of law to take forward a car that he knows contains articles which will be injured by freezing, rather than other cars of whose contents he is ignorant; *Wing v. New York, etc., R. Co.*, 1 Hilt. (N. Y.) 235.

35. *Siebrecht v. Pennsylvania R. Co.*, 21 Misc. Rep. (N. Y.) 615, 48 N. Y. Supp. 3, affg. 20 Misc. Rep. (N. Y.) 730, 46 N. Y. Supp. 1100.

36. *Hewett v. Chicago, etc., R. Co.*, 63 Iowa 611, 18 Am. & Eng. R. Cas. 658; *Fox v. Boston, etc., R. Co.*, 148 Mass. 220, 19 N. E. 222, 1 L. R. A. 702; *McGraw v. Baltimore, etc., R. Co.*, 18 W. V. 361, 41 Am. Rep. 696, 9 Am. & Eng. R. Cas. 188.

Proof of negligent delay by a subsequent carrier, and that without it the injury would have been avoided, is a complete answer to an action seeking to hold the first carrier responsible by reason of his delay, for the injury to fruit by freezing while in custody of such subsequent carrier. *Michigan Cent. R. Co. v. Burrows*, 33 Mich. 6.

instead of retaining it in storage until warmer weather.³⁷ A carrier is liable for loss by freezing where the goods are detained for excessive charges.³⁸ A carrier which receives cars which it knows, or should know, contain perishable goods, and, on account of the impassable condition of its own road, which runs through a warm section, without notifying the shipper, ships them in the dead of winter by a northern route, during transit on which the goods are frozen and destroyed, is liable in damages for the value of the goods.³⁹ A common carrier is not as a matter of law, free from negligence for the loss by freezing of fruit carried over its road, although it does what is usual and customary for other carriers to do under similar circumstances.⁴⁰ An action will lie against a carrier for non-delivery, although the goods are partially injured, and that by the act of God, and it can have no deduction from the value of goods lost by it and never delivered, for damages caused by the act of God.⁴¹ Such a defense, if the goods had been tendered and delivered, would only go in mitigation of damages.⁴² Where goods are injured in the possession of a carrier by act of God, the carrier is not liable, unless its negligence concurred in causing the injury.⁴³ It is not liable when such injury was not

37. *Tucker v. Pennsylvania R. Co.* 11 Misc. Rep. (N. Y.) 366, 32 N. Y. Supp. 1, wherein the court said: "As carrier, it agreed to transport the goods, and its duty with regard to their shipment called for reasonable expedition in forwarding them after their receipt, with perhaps some duty of greater expedition in the case of perishable goods, and unreasonable delay rendered it liable for resulting damages, (*Tierney v. New York Cent., etc., R. Co.*, 76 N. Y. 305), but it is no part of the law of this state that a carrier should, in the course of his duty as such, assume the functions of a warehouseman for the purpose of delaying transit of goods after the

consignor has himself selected the time of shipment."

38. *Milton v. Denver, etc., R. Co.*, 1 Colo. App. 307, 29 Pac. 22.

39. *Pierce v. Southern Pac. R. Co.*, 120 Cal. 156, 47 Pac. 874, 40 L. R. A. 350, 7 Am. & Eng. R. Cas. N. S. 564, affd. 52 Pac. 302, 40 L. R. A. 354, 10 Am. & Eng. R. Cas. N. S. 88.

40. *Hinton v. Eastern R. Co.*, 72 Minn. 339, 75 N. W. 373, 11 Am. & Eng. R. Cas. N. S. 125.

41. *Charlotte, etc., R. Co. v. Wooten*, 87 Ga. 203, 13 S. E. 509.

42. *Houston, etc., R. Co. v. Harn*, 44 Tex. 628.

43. *Ferguson v. Southern Ry. Co.*, 91 S. C. 61, 74 S. E. 129.

contributed to by any negligence of the carrier.⁴⁴ A storm of unusual severity constitutes an act of God, relieving a railway company from liability for injury to freight.⁴⁵ The destruction by the elements of property in the possession of a carrier does not relieve it from liability unless caused by some irresistible superhuman cause.⁴⁶ A carrier is liable for loss of goods which he undertakes to carry, irrespective of its fault, if it does not occur by act of God or the public enemies.⁴⁷ An injury cannot be said to be the act of God which, under any fair view, can be attributed to the negligence of man.⁴⁸ An agreement by a railroad to transport goods from one station to another within a certain time does not make the carrier an absolute insurer of the goods, but their destruction within the prescribed time by an act of God will excuse non-delivery.⁴⁹ The Interstate Commerce Act, section 20, as amended, does not make common carriers liable for loss or injury due to an act of God or the public enemy.⁵⁰ Under the Carmack amendment, Act June 29, 1906, section 7, to the Interstate Commerce Act, section 20, a carrier is not excused from liability for destruction of goods by flood, unless it shows some activity in protecting them as necessity arises.⁵¹

44. *Gulf, etc., R. Co. v. Texas Star Flour Mills*, (Tex. Civ. App.) 143 S. W. 1179, a carrier is not required to procure cars of sufficient strength to withstand a storm which it cannot reasonably anticipate as likely to occur.

45. *Louisville & N. R. Co. v. McKenzie*, 5 Ala. App. 605, 59 So. 345.

46. *Stockton Lumber Co. v. California Nav. & Improvement Co.*, 10 Cal. App. 197, 101 Pac. 541.

47. *Heyman v. Stryker*, 116 N. Y. Supp. 638.

The term "public enemy," under the rule that a carrier is liable for the loss of goods except by the act of God or the public enemy, means enemy

of the country, and does not include mobs. *Pittsburg, etc., Ry. Co. v. City of Chicago*, 242 Ill. 178, 89 N. E. 1022, aff'g judg. 144 Ill. App. 293.

48. *Georgia, etc., Ry. Co. v. Barfield*, 1 Ga. App. 203, 58 S. E. 236. See also *Central of Ga. Ry. Co. v. Hall*, 124 Ga. 322, 52 S. E. 679, 4 L. R. A. (N. S.) 898, 110 Am. St. Rep. 170; *Savannah, etc., Ry. Co. v. Commercial Guano Co.*, 103 Ga. 590, 30 S. E. 555.

49. *Sauter v. Atchison, etc., Ry. Co.*, 78 Kan. 331, 97 Pac. 434.

50. *Cleveland, etc., Ry. Co. v. Hayes*, — Ind. —, 102 N. E. 34.

51. *National Rice Milling Co. v.*

§ 4. Proximate cause of loss or injury.

The act of God which would excuse a common carrier for loss of or injury to goods, must be the immediate or proximate, and not the remote, cause of the loss.⁵² But it is not essential to the exemption of a carrier from liability for the loss of or injury to goods during their transportation, that the damages result solely from any one of the exceptional causes, such as the act of God or a public enemy, or the sole fault of the owner, it not being liable if two or all of such causes combine to produce the injury, if the carrier itself is without fault.⁵³ Where a common carrier merely fails to make prompt delivery of goods, and they are thereby lost in an unprecedented storm, it will be protected from liability, the act of God, and not its negligence, being the proximate cause.⁵⁴ A common carrier is not liable for injury to a shipper's goods by a fire, for which it was not responsible, although the goods were exposed to injury by negligent delay in transmission, as the delay

New Orleans & N. E. R. Co., 132 La. 615, 61 So. 708.

Where an unprecedented flood was threatened as the result of a general storm, it was the carrier's duty to exercise unusual care to see that a car loaded with lime, likely to become ignited by water, be kept removed a safe distance from cars loaded with rice belonging to the plaintiff. *Id.*

Inaccuracy in a weather bureau's forecast is no defense, where the carrier showed no reasonable activity to protect the shipment after being warned of the impending flood. *Id.*

52. *King v. Shepherd*, 3 Story (U. S.) 349; *Missouri Pac. R. Co. v. Barnes*, 2 Tex. App. Civ. Cas. § 574; *Lepford v. Charlotte, etc., R. Co.*, 7 Rich. L. (S. C.) 409, a carrier is not liable for a loss occasioned by delay attributable to the act of God, but

is liable for the injury to and depreciation of the goods caused by bad handling, which was not a necessity or unavoidable consequence.

53. *McCarthy v. Louisville, etc., R. Co.*, 102 Ala. 193, 48 Am. St. Rep. 29, 61 Am. & Eng. C. Cas. 178, 14 So. 370, the carrier is liable for a loss resulting from the combined fault of the carrier and owner.

54. *International, etc., R. Co. v. Bergman*, (Tex. Civ. App.) 64 S. W. 999.

Where wheat shipped by plaintiff over the defendant railroad was damaged, and a part of it totally destroyed, in an unprecedented storm, which occurred while the wheat was still in the possession of the railroad company, the railroad had been guilty of negligence in failing to place the wheat on the proper elevator tracks promptly, so that it could be

cannot be deemed the proximate cause of the injury.⁵⁵ Whether the loss of goods, intrusted to a common carrier, is to be attributed to inevitable necessity, not arising from the intervention of man, and which no human prudence could have avoided, is a question of fact for the jury.⁵⁶ Where a railroad moves a burning car of cotton to save its own property, such action, and not the original fire, is the proximate cause of the burning of other property near which the car is moved.⁵⁷ The negligence of a railroad company in carrying high proof spirits with the barrel in a broken condition was not the proximate cause of a fire destroying the spirits, which originated in some way after the consignee had taken possession and when his agents were entering the car to remove the goods.⁵⁸ Where goods were delivered by a railroad company to a transfer or drayage company and destroyed by fire while in its possession, the fire was the proximate cause of the loss, and the drayage company could not escape liability on the ground that the consignee had delayed making payment of drafts attached to the bill of lading, and thereby delayed surrender of the goods to the transfer company.⁵⁹ Where the car load of freight, when burned, was standing on an industrial switch leading to the shipper's warehouse, and the fire was started by a coal oil stove in the office of the warehouse being turned over by one of the shipper's employes, firing the warehouse, from which the flames spread to the car, destroying its contents, the act of the shipper's employe in starting

unloaded, and in other ways; and, but for its negligence, the cars would probably have been unloaded when the storm occurred, it was held, that the storm was the proximate and the company's negligence the remote, cause of the injury to the wheat, and the company was not liable. *Hunt Bros. v. Missouri, etc., R. Co.*, (Tex. Civ. App.) 74 S. W. 69.

55. *Yazoo, etc., R. Co. v. Millsaps*, 76 Miss. 855, 25 So. 672, 71 Am. St. Rep. 542; *Thomas v. Lancaster Mills*,

34 U. S. App. 404, 71 Fed. 481, 19 C. A. 88; *Morrison v. Davis*, 20 Pa. St. 171, 57 Am. Dec. 701, note.

56. *Elliott v. Russell*, 10 Johns. (N. Y.) 1, 6 Am. Dec. 306.

57. *Latta v. New Orleans & N. W. Ry. Co.*, 131 La. 272, 59 So. 250.

58. *Rothchild Bros. v. Northern Pac. Ry. Co.*, 68 Wash. 527, 123 Pac. 1011.

59. *Arkadelphia Milling Co. v. Smoker Merchandise Co.*, 100 Ark. 37, 139 S. W. 680.

the fire was the proximate cause of the loss of the car; it then being in the possession of the shipper, and not of the carrier.⁶⁰ The failure of a carrier to move a car load of lumber, after being made ready for shipment and notice thereof, renders it liable for the loss of the lumber by its subsequent destruction in the burning of adjacent property without the carrier's fault.⁶¹ Where plaintiff's goods, while in the custody of defendant railroad company, were destroyed by a fire which originated without defendant's fault, but which might have been extinguished before the goods were destroyed, if defendant had used ordinary care, defendant's negligence was the cause of the loss.⁶² Though a carrier of goods was negligent in failing to forward goods shipped, it is not liable for the loss of the goods by fire, where it was not negligent with respect to the fire, in the absence of evidence that the negligence in failing to forward the goods was the proximate cause of the loss.⁶³ Where a railroad permits consignees of produce to sell it from cars in a yard known as the "market yard," but does not permit any one consignee to have more than three cars at a time in the market, and other cars are kept in another yard until a car is emptied and released, a consignee cannot recover for a loss from deterioration of produce in the storage yard, where delay in delivery to the market yard was due to the neglect of the consignee in emptying the cars.⁶⁴ Where, in an action against a carrier of corn for delivery to an elevator for drying, the evidence showed that the corn would not have spoiled if it had been turned into the elevator on arrival, the carrier could not relieve itself from liability on the ground that the corn spoiled in consequence of a change of climate.⁶⁵ A carrier is liable for loss of goods where,

60. *American Lead Pencil Co. v. Nashville, etc., Ry.*, 124 Tenn. 57, 134 S. W. 613.

61. *Greene v. Louisville & N. R. Co.*, 163 Ala. 138, 50 So. 937.

62. *Peerless Mfg. Co. v. New York, etc., R. Co.*, 73 N. H. 328, 61 Atl. 511.

63. *General Fire Extinguisher Co.*

v. Carolina & N. W. Ry. Co., 137 N. C. 278, 49 S. E. 208.

64. *Laughlin Bros. Co. v. Philadelphia & R. Ry. Co.*, 225 Pa. 540, 74 Atl. 418.

65. *W. R. Hall Grain Co. v. Louisville & N. R. Co.*, 148 Mo. App. 308, 128 S. W. 42.

though improperly directed they would have reached their intended destination but for the changing of the directions by the carrier's agent.⁶⁶ As between a failure without proper cause to deliver goods from a freight depot upon demand at a time when there was no reasonable ground to apprehend damage by flood, and an unprecedented flood which a day later submerged the depot and damaged the goods, the flood, an act of God, and not the failure to deliver, was the proximate cause of the damage.⁶⁷ Where the flood which injured a shipment of eggs appeared so suddenly and with such magnitude and force that its advent could not be anticipated nor its consequences averted by the exercise of human care and foresight, it was the proximate cause of such injury, and negligent delay, if any, of the carrier in transporting the eggs, whereby they were exposed to the flood, was but the remote cause.⁶⁸ A carrier is not liable for a loss of property in shipment through an act of God, which could not reasonably have been foreseen, although, but for its previous negligence, by which the shipment was delayed, the property would have escaped the danger, and the loss would not have occurred. In such case the negligence is not the proximate cause of the injury.⁶⁹ Delay of a carrier in transporting goods, whereby they come in the path of a flood, and are destroyed by the act of God, is not a proximate cause of their injury.⁷⁰ Negligent delay of a carrier in moving goods, not so un-

66. *Weaver v. Southern Ry. Co.*, 135 Mo. App. 210, 115 S. W. 500.

67. *Atchison, etc., Ry. Co. v. Henry*, 78 Kan. 490, 97 Pac. 465, 18 L. R. A. (N. S.) 177.

68. *Lightfoot v. St. Louis & S. F. R. Co.*, 126 Mo. App. 532, 104 S. W. 482.

69. *Empire State Cattle Co. v. Atchison, etc., Ry. Co.*, 135 Fed. 135, judg. aff'd 147 Fed. 457, 77 C. C. A. 601, and 147 Fed. 463, 77 C. C. A. 607.

70. *Elam v. St. Louis & S. F. R.*

Co., 117 Mo. App. 453, 93 S. W. 851.

While a carrier is responsible for an injury caused by the concurrence of its negligence with an act of God, yet such injury must be a natural and probable consequence of the negligence, and not an unusual and unanticipated consequence, such as an injury to goods caused by an unprecedented and unforeseen flood, to which the carrier's negligent delay in moving the goods subjected them. *Mcfatt Commission Co. v. Union Pac. R. Co.*, 113 Mo. App. 544, 88 S. W. 117.

reasonable as to amount to a conversion, will not render it liable for the loss of goods after they have been carried to their destination and are there destroyed by an act of God before their delivery.⁷¹ Where the negligence of the carrier operates as a contributive element proximate to injury to goods, even though such injury is to some extent caused by the act of God, the carrier is liable as though the negligence was the entire cause of the loss.⁷² Where a consignment of flour was delivered to a carrier for shipment and was retained four days before being forwarded, the carrier was liable for the damage caused by a cyclone on the morning of the next day after its arrival at its destination, since the negligence of the carrier, resulting in the delay at the place of shipment, continued to be an active cause until the consignee had a reasonable time after their arrival within which to remove the goods.⁷³ In an action against a carrier for damages to goods while in transit because the cars were not iced, if the plaintiffs knew or had notice that their contract for icing was not with the carrier, the carrier is not liable, even though the bill of lading was given by it and the money for icing the car was paid to its agent.⁷⁴ The giving of an incorrect notice of delivery by the carrier to the consignee was not the proximate cause of the loss, where goods were refused by the consignee on the ground that they had never been ordered.⁷⁵ Misrepresentation by a shipper as to the contents of a shipment in order to obtain a lower rate does not prevent a recovery for loss of the shipment, where the misrepresentation does not contribute to the loss.⁷⁶ The failure of a carrier to exercise reasonable care in giving notice of the arrival of perishable freight

71. *Rodgers v. Missouri Pac. Ry. Co.*, — Kan. —, 88 Pac. 885.

72. *Gratiot Street Warehouse Co. v. Missouri, etc., Ry. Co.*, 124 Mo. App. 545, 102 S. W. 11.

73. *Alabama G. S. R. Co. v. J. A. Elliott & Son*, 150 Ala. 381, 43 So. 738, 9 L. R. A. (N. S.) 1264.

74. *Connell Bros. v. Southern Ry. Co.*, — N. C. —, 56 S. E. 559.

75. *Langsdorf v. New York Cent., etc., R. Co.*, 142 N. Y. Supp. 336.

76. *Mobile, etc., R. Co. v. T. J. Phillips & Co.*, — Miss. —, 60 So. 572.

has been held to be the proximate cause of an injury to the freight.⁷⁷ Defendant carrier was held not liable for loss sustained by plaintiffs on a car of cabbage, where the consignee's refusal to accept the cabbage was not because of the carrier's error in adding an icing charge to the expense bill.⁷⁸ Where a carrier fails to forward goods delivered for shipment promptly, and carelessly delays the shipment, and the goods are damaged in transit by an act of God which would not otherwise have caused the damage, he is liable; the unreasonable delay being the proximate or concurring cause thereof whether the goods are perishable or not.⁷⁹

§ 5. Loss or injury by the public enemy.

The common law liability of a common carrier, as an insurer of goods carried, did not extend to losses caused by the acts of public enemies; and the term enemies was understood to mean the public enemies of the country of the carrier, and not of the owner of the goods, and did not include thieves, robbers, or those who engaged in mobs, riots or insurrections. The reasons of the rule were that it would impose upon the carrier a great hardship to compel him to pay for losses for which there was no remedy against those who brought the loss upon him, and that there could be little if any danger of his combining with the common enemy to defraud the owner of the goods; and the reasons for the exception from the rule of robbers, rioters, insurgents, or irresistible mobs, were that the carrier might have a remedy against them, and that there was great danger of collusion between them and the carrier for defrauding the owner or shipper of the goods. Losses by thieves or robbers, mobs or riots, were, therefore, to be borne by the carrier unless by contract he had absolved himself from such liability. Pirates, however, were regarded as the common enemy

77. *Uber v. Chicago, etc., Ry. Co.*, 151 Wis. 431, 138 N. W. 57.

78. *Freeman v. Quebedeaux*, (Tex. Civ. App.) 151 S. W. 643.

79. *Bibb Broom Corn Co. v. Atchison, etc., Ry. Co.*, 94 Minn. 269, 102 N. W. 709, 69 L. R. A. 509, 110 Am. St. Rep. 361.

of all mankind and, therefore, within the term public enemies.⁸⁰ The general rule is still maintained that a capture by public enemies of the property intrusted to a common carrier releases him from all further obligations respecting it, since such acts puts it out of his power to do what he engaged to do.⁸¹ But the carrier is bound to use due precaution against capture and due diligence to rescue property that has been captured, since, although it is not an insurer against such losses, it is bound to reasonable and ordinary care as a bailee.⁸² Where goods were taken from a carrier by an officer or an armed force of the Confederate government in the civil war, it was held in a number of cases that the carrier was not liable because it had been deprived of them by an act of the public enemy.⁸³ So where goods were taken by United States

80. *Russell v. Neiman*, 17 Com. B. (N. S.) 163; *Coggs v. Bernard*, 2 Ld. Raym. 909, 3 Salk. 11; *Lewis v. Ludwick*, 6 Coldw. (Tenn.) 368; *Morse v. Slue*, 1 Ventris 190; *Pickering v. Barkley*, Style, 132; *Forward v. Pittard*, 1 T. R. 27; *Barclay v. Cuvulla of Gana*, 3 Doug. 389, 26 E. C. L. 157.

81. *Spaids v. New York, etc., Steamship Co.*, 3 Daly (N. Y.) 139; *Clark v. Pacific R. Co.*, 39 Mo. 184, 90 Am. Dec. 458.

82. *Caldwell v. Southern Express Co.*, 1 Flipp. (U. S.) 85; *Spaids v. New York, etc., Steamship Co.*, 3 Daly (N. Y.) 139; *Cheviot v. Brooks*, 1 Johns. (N. Y.) 369.

83. *Hubbard v. Harnden Express Co.*, 10 R. I. 244; *Lewis v. Ludwick*, 6 Coldw. (Tenn.) 368, 98 Am. Dec. 454; *Bland v. Adams Express Co.*, 1 Duv. (Ky.) 232, 85 Am. Dec. 623; *Frank v. Keith*, 2 Bush. (Ky.) 123; *Wallace v. Sanders*, 42 Ga. 486, 50 Ga. 134; *Philadelphia, etc., R. Co. v. Harper*, 29 Md. 330; *Keppel v.*

Petersburg R. Co., Chase's Dec. (U. S.) 167; *Porcher v. North Eastern R. Co.*, 14 Rich. L. (S. C.) 181.

That Confederates were not pirates, but public enemies, was held in *Dole v. N. E. Insurance Co.*, 88 Mass. 373, and as to Confederate cruisers, the court, in *Gage v. Tirrell*, 91 Mass. 299, said: "If they can be regarded as agents of a *de facto* government engaged in an actual existing war with the United States, then the loss happened in consequence of a seizure by a public enemy. If not, they are pirates, and pirates are perils of the seas within the exception of the bill of lading."

Where goods were seized or destroyed by Confederate troops, within Confederate lines, it was held in *Nashville, etc., R. Co. v. Estes*, 10 Lea (Tenn.) 749, 3 Am. & Eng. R. Cas. 492, that the carrier was not liable, although the court declined to hold that it was the act of a public enemy. It was said to be a loss caused by *vis major*, analogous to the case of

troops from a Confederate carrier, the carrier was exonerated on the ground that they were taken by the public enemy.⁸⁴ An order issued by a regularly constituted military authority protected the citizen or corporation obeying it, as where a railroad company was commanded by a Confederate general to transport cotton, which was lost.⁸⁵ It has been held that delay in the transportation of goods which is caused solely by a mob, or the interference of strikers and their confederates with the operation of the road, will not render the carrier liable at common law to make good losses arising from a decline in the market price, or from deterioration in their quality on account of their perishable nature, during time of transit.⁸⁶ In Arkansas it has been held that a mob of rioters is not a public enemy within the exception to the rule that makes a common carrier an insurer of goods carried.⁸⁷ In Illinois it has been held that the term "public enemy," under the rule that a carrier is liable for the loss of goods except by act of God or the public enemy, means enemy of the country, and does not include

goods taken from the carrier by attachment. See also *Nashville, etc., R. Co. v. Estis*, 7 Heisk. (Tenn.) 622.

84. *Southern Express Co. v. Womack*, 1 Heisk. (Tenn.) 267; *McCranie v. Wood*, 24 La. Ann. 406; *Patterson v. North Carolina R. Co.*, 64 N. C. 147. See also *Caldwell v. Southern Express Co.*, 1 Flipp. (U. S.) 85.

85. *Railroad v. Hurst*, 11 Heisk. (Tenn.) 625. But even where a railroad company is not in the free exercise of its franchises, and receives property for transportation, and gives the ordinary shipping receipt, without limiting its liability or undertaking, it is still liable as a common carrier, notwithstanding military or other control. *Illinois Cent. R. Co. v. Ashmead*, 58 Ill. 487.

86. *Missouri Pac. R. Co. v. Levi*, 4 Tex. App. Civ. Cas., § 8, 14 S. W. 1062; *Gulf, etc., R. Co. v. Levi*, 76 Tex. 337, 18 Am. St. Rep. 45, 42 Am. & Eng. R. Cas. 439, revg. (Tex.) 12 S. W. 677, 40 Am. & Eng. R. Cas. 115. See also *Southern Express Co. v. Glenn*, 16 Lea (Tenn.) 472; *Baltimore, etc., R. Co. v. O'Donnell*, 49 Ohio St. 489, 55 Am. & Eng. R. Cas. 667.

87. *Missouri Pac. R. Co. v. Nevill*, 60 Ark. 375, 30 S. W. 425, 28 L. R. A. 80. See also *Pacific Express Co. v. Wallace*, 60 Ark. 100, 61 Am. & Eng. R. Cas. 170, holding that a common carrier of goods, who has limited his liability to that of a warehouseman for goods while they are waiting to be called for, is not liable for the loss of liquors taken from its storeroom by a mob.

mobs.⁸⁸ In Indiana it has been held that rioters are not public enemies, that to make a public enemy the government of a foreign country must be at war with the United States, but the strict liability of common carriers, where they are without fault or negligence, does not seem to extend to losses from delay in transporting live stock and perishable property, though such delays are not caused by the act of God or the public enemies.⁸⁹ In New York the rule has been laid down, in respect to the liability of a railroad company for delay in the transportation and delivery of goods, that the carrier is not liable for a delay in the delivery of freight caused by the unlawful and violent conduct of strikers, after they have abandoned the service of the carrier. There is no absolute duty resting upon the carrier to deliver goods within what is under ordinary circumstances, a reasonable time. The actual circumstances must all be considered, and all that can be required of it is the exercise of due care to forward and deliver promptly.⁹⁰ In Illinois it has been held that where the employes of a carrier suddenly refuse to work, and are discharged, and delay results from the failure of the carrier to promptly supply their places, the carrier is responsible for any damage caused by such delay; but where the places of the recusant employes are promptly supplied by other competent men, and the "strikers" then prevent the new employes from doing duty by lawless and irresistible violence, the carrier is not responsible for delay caused solely by such lawless violence.⁹¹ It has been held in the Federal courts that where goods were shipped under a bill of lading exempting the carrier from loss or

88. *Pittsburg, etc., R. Co. v. City of Chicago*, 242 Ill. 178, 89 N. E. 1022, aff'g 144 Ill. App. 293.

89. *Bartlett v. Pittsburg, etc., R. Co.*, 94 Ind. 281, 18 Am. & Eng. R. Cas. 549; *Pittsburg, etc., R. Co. v. Hollowell*, 65 Ind. 193. See also *Lake Shore, etc., R. Co. v. Bennett*, 89 Ind. 457; *White v. Missouri Pac. R. Co.*, 19 Mo. App. 400.

90. *Geismer v. Lake Shore, etc., R. Co.*, 102 N. Y. 563, 55 Am. Rep. 837, 26 Am. & Eng. R. Cas. 287, 7 N. E. 828, revg. 34 Hun (N. Y.) 50.

91. *Pittsburg, etc., R. Co. v. Hazen*, 84 Ill. 36, 25 Am. Rep. 422. See also *Blackstock v. New York, etc., R. Co.*, 20 N. Y. 48; *Indianapolis, etc., R. Co. v. Jungten*, 10 Ill. App. 2nd 5.

damage by fire and they were destroyed by a mob, in the absence of proof of negligence of the carrier or its agent, the carrier was not liable.⁹² Later cases have held that where a carrier received freight for shipment, it is not liable for delay in its delivery which is caused by a strike of its employes, accompanied by violence and intimidation of such character as cannot be overcome by the company or controlled by the civil authorities when called upon.⁹³ These cases, while seemingly an exception to the rule that mere mobs, riots or insurrections are not acts of public enemies, are rather based upon the ground that such acts form reasonable grounds for excusing the carrier from losses occasioned by delay in transportation due to causes over which it had no control, and must be distinguished from the cases where an absolute loss of or injury to goods, in which delay is not a factor, has been sustained.

§ 6. Seizure under legal process.—Attachment.

Where goods are taken out of the carrier's possession under valid legal process, such as attachment or execution, or the carrier is obliged to and does deliver them to the lawful authorities of the place where the goods are, either in transit, or waiting delivery, or the carrier fails to transport and deliver them because of the lawful order of a court having jurisdiction of the subject-matter, the carrier is not liable for non-delivery, the process or order of the court being within the term *vis major*.⁹⁴ But a carrier cannot

92. *Wertheimer v. Pennsylvania R. Co.*, 17 Blatchf. (U. S.) 421; *Hall v. Pennsylvania R. Co.*, 1 Fed. 226, 3 Am. & Eng. R. Cas. 274.

93. *Haas v. Kansas City, etc. R. Co.* (Ga.) 7 S. E. 629; *International etc., R. Co. v. Tisdale*, ((Tex.) 4 L. R. A. 545, 11 S. W. 900; *Little v. Fargo*, 43 Hun (N. Y.), 233, and the same defense is available to a transportation company which has undertaken to move goods over the railway com-

pany's line where such railroad was the known agency for the transportation of such goods. (*Wibert v. New York, etc., R. Co.*, 12 N. Y. 245.)

94. *U. S.*—*Robinson v. Memphis, etc., R. Co.*, 16 Fed. 57; *Stiles v. Davis*, 1 Black (U. S.) 101, 17 L. Ed. 33; *The M. M. Chase*, 37 Fed. 708; *The Idaho*, 93 U. S. 575; *Wells v. Maine S. S. Co.*, 4 Cliff. (U. S.) 232; *Post v. Kock*, 30 Fed. 208; *Lemont v. New York, etc., R. Co.*, 23

relieve itself from responsibility for failure to deliver property consigned, by simply showing that it was taken from its custody under valid legal process; but must also show that it promptly gave notice of that fact to the owner.⁹⁵ A seizure under legal

Fed. 920. See *Adams Express Co. v. Mullins*, 212 U. S. 311, 29 Sup. Ct. 381, 53 L. Ed. 525.

N. Y.—*Speigel v. Pacific Mail Steamship Co.*, 26 Misc. Rep. (N. Y.) 414, 56 N. Y. Supp. 171; *Bliven v. Hudson River R. Co.*, 36 N. Y. 403, 2 Transc. App. (N. Y.) 179; *Scranton v. Bank*, 24 N. Y. 424; *Western Transportation Co. v. Barber*, 56 N. Y. 544; *Roberts v. Stuyvesant Safe Deposit Co.*, 123 N. Y. 57, 25 N. E. 294; *Van Winkle v. U. S. Mail Steamship Co.*, 37 Barb. (N. Y.) 122; *Livingston v. Miller*, 48 Hun (N. Y.) 232, 16 St. Rep. (N. Y.) 71; *Rogers v. Weir*, 34 N. Y. 463; *Barnard v. Kobbe*, 54 N. Y. 516; *Bates v. Stanton*, 1 Duer (N. Y.) 79; *Edson v. Weston*, 7 Cow. (N. Y.) 78; *Mierson v. Hope*, 2 Sweeny (N. Y.) 561.

Ga.—*Southern Ry. Co. v. Heymann*, 118 Ga. 616, 45 S. E. 491; *Southern Express Co. v. Sottile Bros.*, 134 Ga. 40, 67 S. E. 414, 28 L. R. A. N. S. 139, even though the law be unconstitutional, it never having been judicially declared so; *Savannah, etc., R. Co. v. Wilcox*, 48 Ga. 432, 11 Am. Ry. Rep. 375; *Wallace v. Matthews*, 39 Ga. 617, 99 Am. Dec. 473.

Cal.—*Hayden v. Davis*, 9 Cal. 573.

N. H.—*Hett v. Boston, etc., R. Co.*, 69 N. H. 139, 44 Atl. 910; *Johnson v. Grand Trunk R. Co.*, 44 N. H. 626.

Conn.—*Osgood v. Carver*, 43 Conn. 24, 30.

Minn.—See *Thomas v. Northern Pac. Express Co.*, 73 Minn. 185.

Or.—See *Coos Bay, etc., Nav. Co. v. Siglin*, 34 Or. 80.

Ind.—*Indiana, etc., R. Co., v. Doremeyer*, 20 Ind. App. 605, 50 N. E. 497, 67 Am. St. Rep. 264; *Ohio, etc., R. Co. v. Yohe*, 51 Ind. 181, 19 Am. Rep. 727.

Mass.—*Adams v. Scott*, 104 Mass. 164. But see *Edwards v. White Line Transit Co.*, 104 Mass. 163; *French v. Star Union Transp. Co.*, 134 Mass. 288.

Mich.—*Pingree v. Detroit, etc., R. Co.*, 66 Mich. 143, 33 N. W. 298, 11 Am. St. Rep. 479, although the writ does not specify the particular property levied on.

Mo.—*Landa v. Holck*, 129 Mo. 663; *A. C. L. Hasse & Sons Fish Co. v. Merchants' Despatch Transp. Co.*, 143 Mo. App. 42, 122 S. W. 362.

N. Mex.—*MacVeagh v. Atchison, etc., R. Co.*, 3 N. Mex. 205, 18 Am. & Eng. R. Cas. 654, 5 Pac. 457.

Or.—*Jewett v. Olsen*, 18 Or. 419, 17 Am. St. Rep. 745, 42 Am. & Eng. R. Cas. 435, 23 Pac. 262.

Pa.—*Baltimore, etc., R. Co. v. Davis*, (Pa.) 12 Atl. 335, 32 Am. & Eng. R. Cas. 563.

Vt.—*Burton v. Wilkinson*, 18 Vt. 186, 46 Am. Dec. 145.

Eng.—*Verrall v. Robinson*, 5 Tyr. 1069, 4 D. P. C. 242; *Wilson v. Anderton*, 1 B. & Ad. 450, 2 E. C. L. 426; *Sheridan v. New Quay Co.*, 4 C. B. N. S. 618, 93 E. C. L. 618.

⁹⁵ *Speigel v. Pacific Mail Steamship Co.*, 26 Misc. Rep. (N. Y.) 414,

process will excuse a common carrier from delivering to the owner goods intrusted to its care for shipment, although the owner was not the attachment defendant.⁹⁶ But a seizure of property in the

56 N. Y. Supp. 171; *Bliven v. Hudson River R. Co.*, 36 N. Y. 403, affg. 35 Barb. (N. Y.) 188; and other N. Y. cases cited under preceding note; *Robinson v. Memphis, etc., R. Co.*, 16 Fed. 57; *Southern Express Co. v. Sottile Bros.*, 134 Ga. 40, 67 S. E. 414, 28 L. R. A. N. S. 139; *Ohio, etc., R. Co. v. Yohe*, 51 Ind. 181, 19 Am. Rep. 727; *Jewett v. Olsen*, 18 Or. 419, 17 Am. St. Rep. 745, 42 Am. & Eng. R. Cas. 435; *Merz v. Chicago & N. W. Ry. Co.*, 86 Minn. 33, 90 N. W. 7; *Baltimore, etc., R. Co. v. O'Donnell*, 49 Ohio St. 489; *Lemont v. New York, etc., R. Co.*, 28 Fed. 920; *The M. M. Chase*, 37 Fed. 708; *MacVeagh v. Atchison, etc., R. Co.*, 3 N. Mex. 205, 18 Am. & Eng. R. Cas. 655, 5 Pac. 457; *Frank v. Central R. Co.*, 9 Pa. Super. Ct. 129, *Taughner v. Northern Pac. Ry. Co.*, 21 N. D. 111, 129 N. W. 747.

A common carrier in whose hands goods shipped are attached discharges its duty to the consignor by giving notice of the attachment to the latter's husband, having the bill of lading in his possession, since the carrier has the right to presume from such possession that the husband is the agent of the consignor, without further inquiry as to how or by what means he acquired such possession. *Furman v. Chicago, etc., R. Co.*, 81 Iowa 540, 46 N. W. 1049, 45 Am. & Eng. R. Cas. 385; *Id.*, 57 Iowa 42, 6 Am. & Eng. R. Cas. 280; 62 Iowa 395, 23 Am. & Eng. R. Cas. 730, 68 Iowa, 219.

96. *Indiana, etc., R. Co. v. Doremeyer*, 20 Ind. App. 605, 67 Am. St. Rep. 264, 50 N. E. 497; *Landa v. Holck*, 129 Mo. 663; *Stiles v. Davis*, 1 Black (U. S.) 101; *Furman v. Chicago, etc., R. Co.*, 81 Iowa 540, 46 N. W. 1049, 45 Am. & Eng. R. Cas. 345. It might be otherwise, if the sheriff had merely levied an attachment, but not taken possession of the goods. *Rogers v. Weir*, 34 N. Y. 463.

It has been held in Massachusetts and some other jurisdictions that it is no defense to an action against a common carrier for breach of his contract to deliver goods, that they were taken from him by an officer under an attachment against a person who was not their owner. *Edwards v. White Line Transit Co.*, 104 Mass. 159, 6 Am. Rep. 213. See also *Wells v. American Express Co.*, 55 Wis. 23, 6 Am. & Eng. R. Cas. 298, 42 Am. Rep. 695; *Walker v. Detroit, etc., R. Co.*, 49 Mich. 446, 9 Am. & Eng. R. Cas. 251; *The Mary Ann Guest*, 1 Blatchf. (U. S.) 358. The Massachusetts decision above cited seems to have been affected somewhat by the form of the action since the court admitted that the seizure of the goods by the sheriff was not a conversion by the carrier, but that it was liable on its contract for failure to deliver.

It is a good defense to an action against a common carrier for preventing the levy of an attachment upon property in his hands, that the property does not belong to the defendant

hands of a carrier by an officer without valid legal process, or without any warrant or other legal process, does not excuse a carrier for non-delivery, the goods being unlawfully taken from him.⁹⁷ If the goods attached while in a carrier's charge for transportation are not taken from its custody, and the attachment is afterwards dissolved, the levy furnishes no defence to the carrier for failing to transport and deliver them.⁹⁸ Goods in the custody of a carrier within the territorial jurisdiction of the court are subject to attachment, but the service of an attachment on a carrier creates no lien on property not within the territorial jurisdiction of the court issuing the writ at the time of the service, but which is in transit and beyond the limits of the court's jurisdiction.⁹⁹ There must be an actual seizure of the goods intended to be attached.¹ The liability of the carrier ceases when the goods are taken from its custody by legal process and it discharges its duty to the consignor and consignee by giving notice of the attachment, which gives them

in the attachment. *Simpson v. Du-four*, 126 Ind. 322, 26 N. E. 69, 22 Am. St. Rep. 590; *State v. Intoxicating Liquors*, 83 Me. 158.

97. *Bennett v. American Express Co.*, 83 Me. 236, 22 Atl. 159, 23 Am. St. Rep. 774, 49 Am. & Eng. R. Cas. 56; *Gibbons v. Farwell*, 63 Mich. 344, 6 Am. St. Rep. 301; *Kiff v. Old Colony, etc., R. Co.*, 117 Mass. 591, 19 Am. Rep. 429; *Faust v. South Carolina R. Co.*, 8 S. C. 118; *Nickey v. St. Louis, etc., R. Co.*, 35 Mo. App. 79.

But the carrier is not bound to know that a statute under which the process was issued is unconstitutional, and need only look to the face of the writ. *McAlister v. Chicago, etc., R. Co.*, 74 Mo. 351, 7 Am. & Eng. R. Cas. 373. See also, *Robinson v. Memphis, etc., R. Co.*, 16 Fed. 57.

The carrier cannot defend by showing that the real title to the prop-

erty is in a third party, who bailed them to the consignor, unless the property has been taken from the carrier's possession by the bailor without injury to the consignor. *Great Western R. Co. v. McComas*, 33 Ill. 185.

98. *Faust v. South Carolina R. Co.*, 8 S. C. 118.

99. *Santa Fe Pac. R. Co. v. Boscut (N. M.)*, 62 Pac. 977; *Sutherland v. Peoria Second Nat. Bank*, 78 Ky. 250, 6 Am. & Eng. R. Cas. 368; *Western R. Co. v. Thornton*, 60 Ga. 300; *Lawrence v. Smith*, 45 N. H. 533, 86 Am. Dec. 183; *Illinois Cent. R. Co. v. Cobb*, 48 Ill. 402; *Wheat v. Platte City, etc., R. Co.*, 4 Kan. 370; *Bonner v. Marsh*, 10 Smed. & M. (Miss.) 376, 48 Am. Dec. 754.

1. *Pennsylvania R. Co. v. Pennock*, 51 Pa. St. 244.

timely knowledge of the situation of the goods.² Receiving no reply, it has a right to presume that they have abandoned the property, as subject to the legal process which seized it.³ An officer who has made a valid attachment of any property may maintain trover against a carrier who removes such property, after notice of the attachment.⁴ But a demand of goods in the hands of a carrier, by virtue of a chattel mortgage after condition broken, but without any legal process, made by a constable acting merely as agent of the mortgagee, will not make the carrier liable for conversion if it refuses to surrender them, where the goods were received from a third person who has a bill of lading therefor.⁵

§ 7. Seizure under legal process.—Garnishment.

A common carrier is subject to garnishment by the shipper's creditor of property delivered to it for transportation, which is in the carrier's depot or yard and in actual transit at the time of garnishment, and which is within the territorial jurisdiction of the garnishing court.⁶ But a common carrier cannot be charged as a garnishee for goods consigned to defendant, when it does not know whether they belong to the defendant or not.⁷ Where a carrier, to whom goods have been entrusted for transportation is summoned as garnishee and remains in possession of the goods which have been attached as the property of a third person, his refusal to deliver them will not render him liable for a conversion.⁸ A carrier

2. *Furman v. Chicago, etc., R. Co.*, 81 Iowa 540, 46 N. W. 1049, 45 Am. & Eng. R. Cas. 385; *MacVeagh v. Atchison, etc., R. Co.*, 3 N. M. 205, 5 Pac. 457, 18 Am. & Eng. R. Cas. 651; *Savannah, etc., R. Co. v. Wilcox*, 48 Ga. 432, 11 Am. Ry. Rep. 375; *Robinson v. Memphis, etc., R. Co.*, 16 Fed. 57.

3. *Savannah, etc., R. Co. v. Wilcox*, *supra*.

4. *Johnson v. Grand Trunk R. Co.*, 44 N. H. 626.

5. *Kohn v. Richmond, etc., R. Co.*, 37 S. C. 1, 16 S. E. 376, 47 Alb. L. J. 71, 34 Am. St. Rep. 726.

6. *Illinois Cent. R. Co. v. Cobb*, 48 Ill. 402; *Landa v. Missouri, etc., R. Co. (Mo.)*, 31 S. W. 900; *Landa v. Holck*, 129 Mo. 663; *Adams v. Scott*, 104 Mass. 164.

7. *Walker v. Detroit, etc., R. Co.*, 49 Mich. 446, 9 Am. & Eng. R. Cas. 251.

8. *Stiles v. Davis*, 1 Black (U. S.), 101; *Adams v. Scott*, 104 Mass. 164.

after service of notice of garnishment upon it is not liable as for conversion for nondelivery to the consignor or his exercising his right of stoppage *in transitu*.⁹ A garnishment after transportation has ended and the goods are stored in a warehouse, while it remains in force, excuses the carrier from delivering the property to the shipper or consignee.¹⁰ But a common carrier cannot be held as garnishee for property in actual transit at the time of the service of the process,¹¹ nor for property which is beyond the territorial limits of the jurisdiction of the court issuing the process.¹² These exceptions to the general rule are founded upon considerations of public policy, it being considered unreasonable that a carrier should under such circumstances be subjected to the costs, inconvenience and burden of such process merely because it had received to be carried that which the law compelled to be received and carried.¹³

§ 8. Seizure under police regulations.

A common carrier of goods is excused from liability to the shipper or owner, where the goods are taken from its custody by

9. *Letts-Spencer Grocer Co. v. Missouri Pac. Ry. Co.*, 138 Mo. App. 352, 122 S. W. 10.

10. *Cooley v. Minnesota Transfer Co.*, 53 Minn. 327, 55 Am. & Eng. R. Cas. 616, 55 N. W. 141.

11. *Bates v. Chicago, etc., R. Co.*, 60 Wis. 298, 50 Am. Rep. 369; *Illinois Cent. R. Co. v. Cobb*, 48 Ill. 402; *Michigan Cent. R. Co. v. Chicago, etc., R. Co.*, 1 Ill. App. 399; *Western R. Co. v. Thornton*, 60 Ga. 300; *Pennsylvania R. Co. v. Pennock*, 51 Pa. St. 254, disapproving *Childs v. Digby*, 24 Pa. St. 23; *Stevenot v. Eastern R. Co.*, 61 Minn. 104. Compare *Adams v. Scott*, 104 Mass. 164, holding that in an action against a resident of another state who appears and answers, common carriers,

having in their possession, in Massachusetts, in course of transportation to the defendant, at his place of residence, a sealed package of money belonging to him, may be summoned as his trustees.

12. *Illinois Cent. R. Co. v. Cobb*, 48 Ill. 402; *Bates v. Chicago, etc., R. Co.*, 60 Wis. 298, 50 Am. Rep. 369; *Sutherland v. Peoria Second Nat. Bank*, 78 Ky. 250, 6 Am. & Eng. R. Cas. 368. See also, *Pennsylvania R. Co. v. Pennock*, 51 Pa. St. 244; *Clark v. Brewer*, 6 Gray (Mass.), 320; *Lawrence v. Smith*, 45 N. H. 533, 86 Am. Dec. 183; *Wheat v. Platt City, etc., R. Co.*, 4 Kan. 378. Compare *Childs v. Digby*, 24 Pa. St. 23.

13. See cases cited in last two preceding notes.

legal process other than attachment or execution, as, for example, by warrant for being stolen or embezzled property,¹⁴ or being property liable to seizure and destruction, or forfeiture, under the laws of the State, because of being intoxicating liquors or other articles intended for sale or for use in violation of law, or because of being infected with a contagious disease.¹⁵ Where goods are taken from the carrier under such circumstances it must appear that prompt notice of the seizure was given to the owner of the goods, and that they were taken from the carrier without its connivance, procurement or collusion, and that the proceeding and process under which the seizure was made was apparently regular and valid.¹⁶ The motive by which a carrier was controlled is of no avail as a defense, however, though it may be shown to prevent recovery of exemplary damages.¹⁷

14. *Bliven v. Hudson River R. Co.*, 36 N. Y. 407; *Tyler v. London, etc., R. Co.*, 1 C. & E. 285, where the carrier had been intrusted with such goods by the police, who had taken possession of them for the purpose of prosecuting a person charged with theft.

15. *Wells v. Maine Steamship Co.*, 4 Cliff. (U. S.) 228, 29 Fed. Cas. No. 17,401; *State v. Creeden*, 78 I wa, 556, 43 N. W. 673, 7 R. A. 295, 40 Am. & Eng. R. Cas. 31; *Baltimore, etc., R. Co. v. O'Donnell*, 49 Ohio St. 489, 55 Am. & Eng. R. Cas. 672; *Atkinson v. Ritchie*, 10 East 534; *Indianapolis, etc., R. Co. v. Juntgen*, 10 Ill. App. 295; *Nashville, etc., R. Co. v. Estes*, 10 Lea (Tenn.) 755, 3 Am. & Eng. R. Cas. 492; *McAlister v. Chicago, etc., R. Co.*, 74 Mo. 351, 4 Am. & Eng. R. Cas. 210.

A common carrier is liable, however, for the value of fish shipped over its line which were seized by a game warden on the ground that the

fish were illegally caught, where such warden had neither legal nor apparent legal right to seize the same. *Merriman v. Great Northern Express Co.*, 63 Minn. 543, 65 N. W. 1080; *Bennett v. American Express Co.*, 83 Me. 236, 23 Am. St. Rep. 774, 49 Am. & Eng. R. Cas. 57, 22 Atl. 159, 13 L. R. A. 33; *Edwards v. White Line Transit Co.*, 104 Mass. 163, 6 Am. Rep. 213.

16. *Robinson v. Memphis, etc., R. Co.*, 16 Fed. 57; *Gibbons v. Farwell*, 63 Mich. 344, 6 Am. St. Rep. 301; *Kiff v. Old Colony, etc., R. Co.*, 117 Mass. 591, 19 Am. Rep. 429; *Harker v. Dement*, 9 Gill (Md.), 7, 52 Am. Dec. 670.

17. *Baltimore, etc., R. Co. v. O'Donnell*, 49 Ohio St. 489, 55 Am. & Eng. R. Cas. 667.

Where the declaration charges a non-delivery of the goods by the carrier, a plea by the defendant that the goods had, prior to their delivery to the defendant, been forfeited to the

§ 9. Duty of carrier after disaster.

It is the duty of a carrier, when goods in his car are injured, to make reasonable exertions to repair the injury or arrest its progress. Hence, if packages of fur become wet, he should have them opened and dried.¹⁸ But the master of a steamboat carrying wheat, which was wet by inevitable accident, is not liable for damages because he did not dry the wheat.¹⁹ Where an express company, on receiving a package for transportation, is not informed that it contains gold, the company is not negligent in failing to search the ruins of the express car after a fire in order to recover the property. Negligence can not be predicated on the company's omission under such circumstances.²⁰ The consignor of goods by railway, who is also consignee, may not recover of the company because the car containing the goods was left over night, unguarded, on the track, broken into, cases of goods opened, and the goods scattered, although he abandons the consignment to the carrier, when he is unable to prove that any of the goods were damaged thereby, or that any were lost.²¹ Where goods in the hands of a common carrier are placed in jeopardy by some *vis major*, it is bound to use actively and energetically such means to save them as prudent and skillful men engaged in that business might fairly be expected to use under like circumstances. It is error, therefore, to charge the jury that in such case the carrier is bound to use "all the diligence which human sagacity can suggest."²² The

government for non-payment of customs, states no valid defense. *White v. Canadian Pac. R. Co.*, 6 Man. L. Rep. 169.

18. *Chouteaux v. Leech*, 18 Pa. St. 224.

19. *Steamboat Lynx v. King*, 12 Mo. 272.

20. *Rowan v. Wells, Fargo & Co.*, 80 App. Div. (N. Y.) 31, 80 N. Y. Supp. 226.

21. *Silverman v. St. Louis, etc., R. Co.*, 51 La. Ann. 1785, 26 So. 447.

Where the consignee refused to receive any part of the shipment, or to co-operate in examining the goods, and claims reimbursement as for total loss, the carrier will not be held guilty of "converting" the goods, by reason of calling in disinterested and competent persons and having broken packages repacked, and unbroken packages opened and examined, in order to ascertain the character and condition of their contents. *Id.*

22. *Nashville & C. R. Co. v. David*,

fact that a station agent persuaded the consignee of freight to receive goods in a damaged condition and pay the freight does not render the company liable for damages when it would not otherwise be responsible, unless the agent was authorized to assume such responsibility.²³ Where, a shipment of eggs having been caught in transit by a flood, it was agreed between one of the owners and the carrier that the owner should take charge of the eggs and handle them, for the account of the carrier, such agreement did not affect the rights of the parties by serving to create a liability on the part of the carrier for the loss suffered.²⁴ Where a consignee directed the carrier not to re-ice fish in transit, and decay, resulting from failure to re-ice, made transportation unsafe, the carrier could discharge or destroy the shipment without liability.²⁵ Where the verdict in favor of the consignee in an action for the value of damaged chops injured in transportation was the same as plaintiff would have been entitled to recover had he accepted and sold the chops for their reasonable value in their damaged condition, the fact that he unlawfully refused to accept the same and sued for their value, instead of the difference between the value as shipped and as delivered, was immaterial.²⁶ Where a loaded freight car is derailed and left at the place of the accident, the carrier must take reasonable care of its contents; and, if the carrier's employes invite or suggest to bystanders to carry them away or destroy them, the carrier is liable to the shipper for the loss.²⁷ Though liability for fire is excepted, the carrier is bound to do all that reasonable and prudent men could do to prevent the entire destruction of the property after it has caught fire.²⁸ If mercan-

53 Tenn. (6 Heisk.) 261, 19 Am. Rep. 594.

23. Southern Ry. Co. v. Gardner, 127 Ga. 320, 56 S. E. 454.

24. Lightfoot v. St. Louis & S. F. R. Co., 126 Mo. App. 532, 104 S. W. 482.

25. Southern Express Co. v. Fant Fish Co., — Ga. App. —, 78 S. E. 197.

26. Gulf, etc., R. Co. v. H. B. Pitts & Son, 37 Tex. Civ. App. 212, 83 S. W. 727.

27. Lucesco Oil Co. v. Pennsylvania R. Co., 2 Pittsb. R. (Pa.) 477.

28. Woodward v. Illinois Cent. R. Co., Fed. Cas. No. 18,006 (1 Biss. 403); Fed. Cas. No. 18,007 (1 Biss. 447).

dise on board a boat gets wet by accident, and no exertion is made to dry it, the carrier is liable for the damage, though his engagement was to deliver safely, "the dangers of the river excepted."²⁹ A shipper of fruit trees that became injured during the transportation cannot recover for such further injuries as he might have averted by properly caring for the trees.³⁰

§ 10. Loss or injury from inherent nature of goods.

A carrier is not liable for losses or injuries resulting from the inherent nature of the goods, which would not have been prevented by the exercise of ordinary care on its part,³¹ or for loss or injury to goods caused by an inherent defect in the goods themselves, the existence of which was unknown both to the sender and the carrier.³² A carrier is not liable for loss due to the bursting of a hogshead of molasses by reason of fermentation, as this results from the operation of natural laws which a common carrier does not insure against.³³ The general rule above stated has its most frequent application in determining the liability of carriers in the carrying of live stock.³⁴ A common carrier is not responsible for a loss or injury occurring from any inherent natural infirmity or tendency to damage, depreciation, or decay of the goods in the course of transportation.³⁵ The freezing of potatoes by a carrier

29. *Bird v. Cromwell*, 1 Mo. 81, 13 Am. Dec. 470; *Ewart v. Street*, 2 Bailey (S. C.), 157, 23 Am. Dec. 131.

30. *Missouri Pac. Ry. Co. v. Rushin*, 3 Willson Civ. Cas. Ct. App. (Tex.) 318.

31. *American Express Co. v. Smith*, 33 Ohio St. 511, 31 Am. Rep. 561, if, while perishable goods are in transit, an unavoidable delay occurs, the carrier must exercise sound discretion and reasonable diligence in forwarding them to their destination, but, if it does not appear that a change of route would prevent the loss attendant upon delay, he is not

bound to divert the goods to a route over which he has no control, but may sell the goods for the best price he can obtain, in order to convert what would inevitably be a total loss into one that is partial merely. See also, § 4, chap. 2.

32. *Lister v. Lancashire & Y. Ry.*, 72 L. J. K. B. 385, 1 K. B. 878, 88 L. T. 561, 52 Wkly. Rep. 12.

33. *Faucher v. Wilson*, 68 N. H. 338, 38 Atl. 1002, 39 L. R. A. 431.

34. See § 3, chap. 2.

35. *Carpenter v. Baltimore & O. R. Co.*, 6 Pen. (Del.) 15, 64 Atl. 252.

will be held to be caused by the nature of the property, so as to exempt him from liability, provided he has been guilty of no previous negligence or misconduct which can be considered the proximate cause of the injury.³⁶ A carrier is not liable for such damages as result solely from an inherent infirmity in the goods in its care.³⁷ While carriers, in the absence of stipulations to the contrary, are insurers of goods intrusted to them for shipment, they will not be so held where loss or damage results from vices or defects inherent in the goods.³⁸ While a carrier as to most commodities is an insurer against all results incident to the transportation thereof except the act of God, a public enemy, or the fault of the shipper, it is only liable for deterioration in perishable goods, where negligent in protecting the goods from injury while in its custody, or in delivering them with dispatch to the consignee or connecting carrier.³⁹ If the value of peaches delivered to a carrier for transportation was lessened because they became unsound by reason of natural deterioration while in possession of the carrier without its fault, it would not be liable to the owners, though the injury occurred without fault of the consignees, and an instruction to the contrary was erroneous.⁴⁰ A carrier is not responsible for injuries to apples by freezing, due to their own inherent nature and natural causes without fault on the carrier's part, or caused by the shipper's negligence.⁴¹ A common carrier, sued for loss or damage to goods, may defend on the ground that the loss or damage accrued through an inherent vice or natural deterioration of the goods.⁴²

36. *McGraw v. Baltimore & O. R. Co.*, 18 W. Va. 361, 41 Am. Rep. 696.

37. *R. E. Funsten Dried Fruit & Nut Co. v. Toledo, etc., R. Co.*, 163 Mo. App. 426, 143 S. W. 839.

38. *Currie v. Seaboard Air Line Co.*, 156 N. C. 432, 72 S. E. 493.

39. *Philadelphia, etc., R. Co. v. Difendal*, 109 Md. 494, 72 Atl. 193, re-

hearing denied, 109 Md. 494, 72 Atl. 458.

40. *Pennsylvania R. Co. v. Goetschius & Caperton*, 135 Ga. 176, 68 S. E. 1110.

41. *B. F. Schwartz & Co. v. Erie R. Co.*, 32 Ky. Law Rep. 777, 106 S. W. 1188.

42. *Southern Express Co. v. Bailey*, 7 Ga. App. 331, 66 S. E. 960.

§ 11. Care required of carrier in general.

A carrier is not bound to provide against an unprecedented emergency, such as a greater flood than was ever known before in the locality, unless it has reason to suspect that such emergency is about to arise; then it is bound to take such precautionary measures as prudent and skillful men in the same business under like circumstances might fairly be expected to use.⁴³ A common carrier is liable for all losses which it could have prevented by skill and foresight; and the onus is on it to show that the loss was such as it could not have prevented.⁴⁴ It is the duty of a carrier, when goods in its care are injured, to make reasonable exertions to repair the injury or arrest its progress.⁴⁵ If the means of conveyance has become disabled, it is bound to use its utmost exertions to transport or send forward the goods to the place of delivery, even though it have to hire or provide other means for that purpose, or send them by another route.⁴⁶ Whether a carrier has discharged the duty of using care and diligence in the transportation of goods intrusted to it, is to be judged with reference to the nature of the services and the circumstances and exigencies under which it is to be performed. Where skill and capacity are required to accomplish the undertaking it is negligence not to

43. *Nashville, etc., R. Co. v. David*, 6 Heisk. (Tenn.) 261, 19 Am. Rep. 594, 12 Am. Ry. Rep. 9; *Craig v. Childress, Peck* (Tenn.), 270, 14 Am. Dec. 751; *Dillard v. Louisville, etc., R. Co.*, 2 Lea (Tenn.), 299.

Under Georgia statutes a carrier is bound to use extraordinary diligence. *Richmond, etc., R. Co. v. White*, 88 Ga. 805, 12 Ry. & Corp. L. J. 273, 15 S. E. 802. See also, *Lamont v. Nashville, etc., R. Co.*, 9 Heisk. (Tenn.) 59.

44. *Baltimore, etc., R. Co. v. Morehead*, 5 W. Va. 293, if access to the consignee and delivery of the goods

at the end of the route is prevented by a state of war, it is the carrier's duty to take care of the goods for the consignor, and notify him within a reasonable time of its inability to make the delivery, after which its liability is only that of a bailee. See also, *Baltimore, etc., R. Co. v. Keedy*, 75 Md. 320, 23 Atl. 643, 49 Am. & Eng. R. Cas. 124.

45. *Chouteaux v. Leech*, 18 Pa. St. 224, 57 Am. Dec. 602; *Pearce v. The Thomas Newton*, 41 Fed. 106.

46. *The Maggie Hammond*, 9 Wall. (U. S.) 435; *Chicago, etc., R. Co. v. Manning*, 23 Neb. 552.

employ persons having those qualifications.⁴⁷ A common carrier is relieved from liability if it can show that it has provided all reasonable means of transportation, and exercised that degree of care which the nature of the property requires.⁴⁸ A common carrier which has an option as to the mode of shipment must exercise it reasonably under the circumstances for the best interest of the consignee, and it is a breach of the contract to exercise it to his disadvantage unless it is done in good faith and under circumstances which seem to require it.⁴⁹ A railroad company is not, as matter of law, free from negligence in permitting a carload of strawberries received by it to remain for about seven hours without re-icing, at which time the ice is about two-thirds gone, where it is necessary that the ice box should be filled for complete refrigeration.⁵⁰ A shipper of apples assumes the risk of their decay during transit owing to lack of ventilation, where he knew there was no practicable means of ventilating the cars in which they were shipped while in transit.⁵¹ A railroad company will not be required to place its cars containing inflammable materials, when temporarily standing on side tracks, in such situation that they

47. *Holladay v. Kennard*, 12 Wall. (U. S.) 254. See also, *Memphis, etc., R. Co. v. Reeves*, 10 Wall. (U. S.) 176. Compare *Shoemaker v. Kingsbury*, 12 Wall. (U. S.) 369.

The carrier's liability for loss of goods transported over connecting routes, in cases depending on special circumstances, determined; *Woodward v. Illinois Cent. R. Co.*, 1 Biss. (U. S.) 403, 447; *Cohen v. Southern Express Co.*, 45 Ga. 148; *Gray v. Jackson*, 51 N. H. 9; *Pennsylvania R. Co. v. Berry*, 68 Pa. St. 272.

48. *Burke v. United States Express Co.*, 87 Ill. App. 505. The liability of a common carrier as such does not attach to goods which were taken to and placed in its warehouse by the owner or his agent after the closing

hours and when no one representing the carrier was there to receive them, notwithstanding that its "bill clerk" was informed at his residence, which was about 100 feet from the warehouse, that the goods had been left and was requested to bill and ship them early the next morning. *Spofford v. Pennsylvania R. Co.*, 11 Pa. Super. Ct. 97.

49. *Stewart v. Comer*, 100 Ga. 754, 62 Am. St. Rep. 353, 28 S. E. 461; *Blitz v. Union S. B. Co.*, 51 Mich. 588.

50. *Lamb v. Chicago, etc., R. Co.*, 101 Wis. 138, 76 N. W. 1123.

51. *Densmore Commission Co. v. Duluth, etc., R. Co.*, 101 Wis. 563, 77 N. W. 904.

can be watched by policemen, or be within reach of fire engines or other means for extinguishing fires.⁵² A railroad will be liable for loss caused by defects in tank cars which it hires from a third person for the transportation of property of a shipper of oil.⁵³ On refusal of the consignee to accept goods, it devolves on the master of the carrier to have them placed, at the expense of the consignee, in a place where they will not be exposed to loss.⁵⁴ A common carrier of goods is excused from liability to a shipper when the goods are taken from him by legal process and he immediately notifies the shipper.⁵⁵ If transportation is delayed or the goods endangered by the acts of a mob, it is the duty of the carrier to use all reasonable efforts and diligence to protect the goods from injury, to overcome the obstacles thus interposed, and to forward the goods to their destination.⁵⁶

52. Insurance Co. of N. A. v. Lake Erie, etc., R. Co., 152 Ind. 333, 1 Repr. 819, 4 Chic. L. J. Kkly. 201.

53. Cincinnati, etc., R. Co. v. N. K. Fairbanks & Co., 90 Fed. 467, 33 C. C. A. 611, 62 U. S. App. 231, 13 Am. & Eng. R. Cas. N. S. 179.

54. Sonia Cotton Oil Co. v. The Red River, 106 La. 42, 30 So. 303, 87 Am. St. Rep. 293.

55. Bliven & Mead v. Hudson River R. Co., 36 N. Y. 403. See Seizure by legal process, § 6, *ante*.

56. Geismer v. Lake Shore, etc., R. Co., 102 N. Y. 563, 55 Am. Rep. 837; Lang v. Pennsylvania R. Co., 154 Pa. St. 342, 32 W. N. C. (Pa.) 205. See Loss or injury by public enemy, § 5, *ante*.

CHAPTER VIII.

LIABILITY FOR DELAY.

- SECTION**
1. Liability for delay in transportation.
 2. Usage of course or business.
 3. Diligence required of carrier.
 4. Liability where there is a special contract.
 5. Liability where there are special instructions by the shipper.
 6. Liability under statutes requiring prompt forwarding of freight.
 7. Delay in delivering perishable freight.
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 14. Strikes by employees.
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 16. Limitation of liability for delay.
 17. Carrier's duty during delay.
 18. Delay concurring with inevitable accident.

§ 1. Liability for delay in transportation.

The general rule in reference to the liability of a carrier for a delay in the transportation and delivery of goods is that it is required to exercise due care and diligence to guard against delay, and to forward the goods to their destination with all convenient dispatch and deliver them promptly, and the carrier is liable for its failure to do so.¹ There is no rule of law which requires a

1. *N. Y.*—*Geismer v. Lake Shore, etc.*, R. Co., 102 N. Y. 563, 55 Am. Rep. 837; *Waite v. New York Cent., etc.*, R. Co., 110 N. Y. 635, 35 Am. & Eng. R. Cas. 576, affg. 17 St. Rep. (N. Y.) 162, 17 N. E. 730; *Stedman v. Western Transp. Co.*, 48 Barb. (N. Y.) 97; *Little v. Fargo*, 43 Hun (N. Y.), 237.

U. S.—*Missouri Pac. R. Co. v. Hall*, 66 Fed. 868, 32 U. S. App. 60; *Thomas v. Wabash, etc.*, R. Co., 63 Fed. 200.

Ala.—*Louisville, etc.*, R. Co. v. *Touart*, 97 Ala. 514.

Ark.—*St. Louis, etc.*, R. Co. v. *Heath*, 41 Ark. 477, 18 Am. & Eng. R. Cas. 557.

carrier to transport and deliver goods within any definite time after receiving them for transportation, except where there is an express contract to do so within a certain time. In the absence of a special contract there is no absolute duty resting upon a common carrier, implied from the delivery to or receipt by it of goods for transportation, to transport and deliver them within what would be, under ordinary circumstances, a reasonable time. The actual circumstances in each case must be taken into consideration in determining what is a delivery with reasonable promptness in that case.² A carrier is bound to deliver goods within a reasonable time, under ordinary circumstances. Accidents, temporary interruptions or obstructions, which could not, by ordinary prudence, be provided against, excuse delay, but do not absolve from

Cal.—Palmer v. Atchison, etc., R. Co., 101 Cal. 187.

La.—Berje v. Texas, etc., R. Co., 37 La. Ann. 468.

Mo.—Dawson v. Chicago, etc., R. Co., 79 Mo. 296, 18 Am. & Eng. R. Cas. 521; Rankin v. Pacific R. Co., 55 Mo. 167; Schwab v. Union Line, 13 Mo. App. 159.

Neb.—Denman v. Chicago, etc., R. Co., 52 Neb. 140, 71 N. W. 767; Gates v. Chicago, etc., R. Co., 42 Neb. 379, 61 Am. & Eng. R. Cas. 218

N. C.—Purcell v. Richmond, etc., R. Co., 108 N. C. 414; Branch v. Wilmington, etc., R. Co., 88 N. C. 570.

Ohio.—Baltimore, etc., R. Co. v. O'Donnell, 49 Ohio St. 489.

Pa.—Clark v. Needles, 25 Pa. St. 338.

Tex.—International, etc., R. Co. v. Ritchie (Tex. Civ. App.), 26 S. W. 840.

Va.—Spence v. Norfolk, etc., R. Co., 92 Va. 102, 22 S. E. 815, 29 L. R. A. 578, 2 Am. & Eng. R. Cas. N. S. 708, and a consignor of the goods

who delivers them to a carrier for shipment subject to a lien for the purchase price, retaining the right to possession until the drafts therefor are accepted by the consignee, and who makes a special contract with the company for their shipment, guaranteeing the payment of freight, may sue for damages for failure to deliver within a reasonable time.

The person who contracts with the carrier for the transportation may maintain an action in his own name, although other parties have an interest in the goods. Galveston, etc., R. Co. v. Barnett (Tex. Civ. App.), 26 S. W. 782. He may likewise sue in his own name, where the contract was made in the name of commission merchants to whom he consigns property, but for his own

That it received the stock on Sunday is no excuse for the delay of a railroad company in forwarding the stock. Guinn v. Wabash, etc., R. Co., 20 Mo. App. 453.

2. Carrier must deliver with rea-

the duty to carry and deliver as soon as it becomes practicable, or as soon as the impediment to the transportation is removed or can

sonable promptness or without unreasonable delay.

N. Y.—Geismer v. Lake Shore, etc., R. Co., 102 N. Y. 563, 55 Am. Rep. 837; Little v. Fargo, 43 Hun (N. Y.), 137; Parsons v. Hardy, 14 Wend. (N. Y.) 215, 28 Am. Dec. 521; Wibert v. New York, etc., R. Co., 19 Barb. (N. Y.) 36, 12 N. Y. 245; Stedman v. Western Transp. Co., 48 Barb. (N. Y.) 97.

Del.—Truax v. Philadelphia, etc., R. Co., 3 Houst. (Del.) 233.

Ga.—Johnson v. East Tennessee, etc., R. Co., 90 Ga. 810; Smith v. Cleveland, etc., R. Co., 92 Ga. 539; Rome R. Co. v. Sullivan, 14 Ga. 277, 32 Ga. 400.

Ill.—Michigan Cent. R. Co. v. Curtis, 80 Ill. 324; Wabash, etc., R. Co. v. McCasland, 11 Ill. App. 491; Illinois Cent. R. Co. v. Waters, 41 Ill. 73; Michigan Southern, etc., R. Co. v. Day, 20 Ill. 375, 71 Am. Dec. 278; Galena, etc., R. Co. v. Rae, 18 Ill. 488, 68 Am. Dec. 574.

Ind.—Pennsylvania Co. v. Clark, 2 Ind. App. 146.

Mass.—Fox v. Boston, etc., R. Co., 148 Mass. 220, 37 Am. & Eng. R. Cas. 632; Hoadley v. Northern Transp. Co., 115 Mass. 304, 15 Am. Rep. 106.

Miss.—Illinois Cent. R. Co. v. Haynes, 64 Miss. 604, 30 Am. & Eng. R. Cas. 38; Vicksburg, etc., R. Co. v. Ragsdale, 46 Miss. 458; Water Valley Bank v. Southern Express Co., 71 Miss. 741.

Mo.—Dawson v. Chicago, etc., R. Co., 79 Mo. 296, 18 Am. & Eng. R. Cas. 521; Leonard v. Chicago, etc.,

R. Co., 57 Mo. App. 366; Read v. St. Louis, etc., R. Co., 66 Mo. 208; Gregory v. Wabash R. Co., 46 Mo. App. 574; Schwab v. Union Line, 13 Mo. App. 159.

N. C.—Boner v. Merchants' Steamboat Co., 1 Jones L. (N. C.) 211; Harrell v. Owens, 1 Dev. & B. L. (N. C.) 273.

Ohio.—American Express Co. v. Smith, 33 Ohio St. 511, 31 Am. Rep. 561.

Pa.—Eagle v. White, 6 Whart. (Pa.) 505, 37 Am. Dec. 434; Hill v. Humphreys, 5 W. & S. (Pa.) 123, 39 Am. Dec. 117; Ludwig v. Meyre, 5 W. & S. (Pa.) 438.

S. C.—Nettles v. South Carolina R. Co., 7 Rich. L. (S. C.) 190, 62 Am. Dec. 409.

Tenn.—Nashville, etc., R. Co. v. Jackson, 6 Heisk. (Tenn.) 271, 12 Am. Ry. Rep. 54; East Tennessee, etc., R. Co. v. Nelson, 1 Coldw. (Tenn.) 276.

Tex.—Missouri Pac. R. Co. v. Weisman, 2 Tex. Civ. App. 86; Atchison, etc., R. Co. v. Bryan (Tex. Civ. App.), 28 S. W. 98.

Vt.—Mann v. Birchard, 40 Vt. 326.

Wis.—McLaren v. Detroit, etc., R. Co., 23 Wis. 138; Nudd v. Wells, 11 Wis. 407.

Eng.—Taylor v. Great Northern R. Co., L. R. 1 C. P. 385, 12 Jur. N. S. 372, 35 L. J. C. P. 210, 14 W. R. 639; Hughes v. Great Western R. Co., 14 C. B. 637, 78 E. C. L. 637, 25 Eng. L. & Eq. 347; D'Arc v. London, etc., R. Co., L. R. 9 C. P. 325; Hales v. London, etc., R. Co., 4 B. & S. 66, 116 E.

reasonably be overcome.³ In determining what is a reasonable time under any given circumstances, the mode of conveyance, the nature of the goods, the season of the year, the character of the weather, and the ordinary facilities for transportation under the control of the carrier are to be considered.⁴ Likewise, the character of the freight, whether articles not liable to decay or damage by a brief delay, such as iron, wood, cotton, grain, and things of like character, or articles by reason of their nature and inherent character liable to loss or damage by the delay of a day, such as live stock, fish, oysters, fruit, vegetables and things of similar character, must be taken into consideration.⁵ Ordinarily, what is a reasonable time within which delivery should be made and what is unreasonable delay in transportation is a question of fact for the jury to determine under all the circumstances attending the particular case.⁶ That the time occupied in transportation and

C. L. 66; *Donohoe v. London, etc., R. Co.*, 15 W. R. 792; *Raphael v. Pickford*, 5 M. & G. 558, 44 E. C. L. 295; *Great Western R. Co. v. Redmayne*, L. R. 1 C. P. 329; *Robinson v. Great Western R. Co.*, 1 H. & R. 97, 14 W. R. 206.

3. *Baltimore, etc., R. Co. v. O'Donnell*, 49 Ohio St. 489; *Vicksburg, etc., R. Co. v. Ragsdale*, 46 Miss. 477; *Briddon v. Great Northern R. Co.*, 28 L. J. Exch. 51, 32 L. T. 94; *Michigan Cent. R. Co. v. Curtis*, 80 Ill. 324.

4. *McGraw v. Baltimore, etc., R. Co.*, 18 W. Va. 361, 9 Am. & Eng. R. Cas. 188, 41 Am. Rep. 696; *Cobb v. Illinois Cent. R. Co.*, 38 Iowa, 601; *Illinois Cent. R. Co. v. Haynes*, 64 Miss. 604; *Galveston, etc., R. Co. v. Tuckett* (Tex. Civ. App.), 25 S. W. 150; *Richmond, etc., R. Co. v. Benson*, 86 Ga. 203, 22 Am. St. Rep. 446; *Hales v. London, etc., R. Co.*, 4 B. & S. 66, 116 E. C. L. 66, 32 L. J. Q. B.

292; *Wren v. Eastern Counties R. Co.*, 1 L. T. N. S. 5.

5. *Cantwell v. Pacific Exp. Co.*, 58 Ark. 487, 61 Am. & Eng. R. Cas. 206, note; *Dixon v. Chicago, etc., R. Co.*, 64 Iowa, 531, 18 Am. & Eng. R. Cas. 526, 52 Am. Rep. 460; *McGraw v. Baltimore, etc., R. Co.*, *supra*; *Louisville, etc., R. Co. v. Brinley* (Ky.), 29 S. W. 305; *International, etc., R. Co. v. Ritchie* (Tex. Civ. App.), 26 S. W. 840. A carrier must exercise reasonable care in selecting a route by which a corpse is shipped, and is liable for damages in sending it by a route which is very much longer than is necessary. *Wells, etc., Express v. Fuller*, 13 Tex. Civ. App. 610, 35 S. W. 824.

6. *Waite v. New York Cent., etc., R. Co.*, 110 N. Y. 635, 35 Am. & Eng. R. Cas. 576; *Regan v. Grand Trunk R. Co.*, 61 N. H. 579; *Davis v. Jacksonville S. E. Line*, 126 Mo. 69; *Bal-*

delivery is within common knowledge unusual and unnecessary may be sufficient to justify a finding of unreasonable delay attributable to the negligence of the carrier, unless explained by circumstances showing the cause of delay to have been such as the carrier was not liable for and which furnish a valid excuse. But difficulties in the way of transportation known to the carrier at the time of accepting the shipment cannot excuse such delay.⁷ An action for delay in transporting freight is not maintainable where the goods reached their destination in the time usually occupied in the journey, and there was no special undertaking for delivery in a fixed time.⁸ Where goods are sent by the usual route, the carrier must use reasonable diligence, and whether he has done so is a question of fact.⁹ The specification of a certain time as a reasonable time for the transportation of property by a common carrier is not conclusive upon the shipper, and does not relieve the common carrier from injuries resulting from delay caused by its negligence, although the property is delivered within the specified time.¹⁰ A common carrier cannot relieve itself by contract

timore, etc., R. Co. v. Pumphrey, 59 Md. 390, 9 Am. & Eng. R. Cas. 331; International, etc., R. Co. v. Server, 3 Tex. App. Civ. Cas. § 440; Bell v. Windsor, etc., R. Co., 24 Nova Scotia, 521; Hunter v. Borst, 13 U. C. Q. B. 141; Hawes v. Southeastern R. Co., 54 L. J. Q. B. Div. 174, 52 L. T. N. S. 514; Hales v. London, etc., R. Co., 4 B. & S. 66, 116 E. C. L. 66, 32 L. J. Q. B. 292.

7. St. Clair v. Chicago, etc., R. Co., 80 Iowa, 304; Chicago, etc., R. Co. v. Simms, 18 Ill. App. 68; St. Louis, etc., R. Co. v. Heath, 41 Ark. 476, 18 Am. & Eng. R. Cas. 557; Illinois Cent. R. Co. v. Cobb, 64 Ill. 128; Illinois Cent. R. Co. v. McClellan, 54 Ill. 58, 5 Am. Rep. 83; Michigan Southern, etc., R. Co. v. Day, 20 Ill.

375, 71 Am. Dec. 278; Texas, etc., R. Co. v. Boggs (Tex. Civ. App.), 30 S. W. 1089; Ormsby v. Union Pac. R. Co., 4 Fed. 706, 2 McCrary (U. S.) 48; Mann v. Birchard, 40 Vt. 326; Ruddy v. Midland Great Western R. Co., L. R. 8 Ir. 224.

8. Lowe v. East Tennessee, etc., R. Co., 90 Ga. 85, 15 S. E. 692; Atlantic, etc., R. Co. v. Texas Grate Co., 81 Ga. 602.

9. Schwab v. Union Line, 13 Mo. App. 159; Hales v. London, etc., R. Co., 4 B. & S. 70, 116 E. C. L. 70; Johnson v. Midland R. Co., 4 Exch. 367; Blakemore v. Lancashire, etc., R. Co., 1 F. & F. 76.

10. Leonard v. Chicago, etc., R. Co., 54 Mo. App. 293.

from liability for its own negligence.¹¹ A carrier is not liable as for converting goods unreasonably delayed, in the absence of a demand for delivery and refusal thereof while the goods are in its possession.¹² A carrier's delay in delivering goods is not a conversion thereof, no matter how long continued, so as to make it liable for their value, and the consignee should receive them when tendered and sue for damages resulting from the delay in delivery.¹³ In the absence of a special contract with the carrier whereby such carrier agrees to deliver a shipment within a specified time, mere delay in transportation does not create a liability on the part of the carrier to respond in damages.¹⁴ Where a carrier fails or refuses to accept freight tendered it for transportation because of its inability to transport it, occasioned by extraordinary circumstances or an emergency that could not have been reasonably foreseen and for which the carrier is not responsible, such failure or refusal gives the shipper no right to recover for delay in transportation of the freight tendered, where the carrier does all that could have been reasonably required of it to meet the demands made upon it for transportation.¹⁵ A carrier being informed, when a package was delivered to it for transportation, that it contained medicine for a sick girl, and that it was important that it should be delivered without delay, it is unnecessary to recover for suffering by her from delay in its delivery, that the order for the medicine made by her father and doctor, when in fact she was unconscious, should have been with her knowledge

11. *Armstrong v. United States Express Co.*, 159 Pa. St. 640, 28 Atl. 448; *Union Pac. R. Co. v. Rainey* (Colo.), 34 Pac. 986; *Leonard v. Chicago, etc., R. Co.*, 54 Mo. App. 293; *Galveston, etc., R. Co. v. Parsley*, 6 Tex. Civ. App. 150, 23 S. W. 64; *Atchison, etc., R. Co. v. Lawler* (Neb.), 58 N. W. 968; *Atchison, etc., R. Co. v. Grant*, 6 Tex. Civ. App. 674, 26 S. W. 288.

12. *Southern Ry. Co. v. Moody*, 169 Ala. 292, 53 So. 1016.

13. *Gulf, etc., Ry. Co. v. Somerville Mercantile Agency* (Tex. Civ. App.), 104 S. W. 1072.

14. *Bacon v. Cleveland, etc., Ry. Co.*, 155 Ill. App. 40; *Shoot v. Cleveland, etc., R. Co.*, 145 Ill. App. 532.

15. *Seaboard Air Line Ry. v. Rentz & Little*, 60 Fla. 429, 54 So. 13.

and approval.¹⁶ A claim for loss of profits by being compelled to stop an electric plant because a shaft used therein was broken en route and returned to the repair shop by the express company to be repaired before it was forwarded to the plant was based upon the owner's being deprived of the use of the shaft, and whether the delay was caused by injury to the shaft or by other reasons was immaterial.¹⁷ Though a consignor of goods shipped to his own order may divert them from their original destination, and generally this is not changed because they are shipped with directions to notify the proposed vendee, as between the parties that right does not exist when the carrier has given a bill of lading for the goods, and it has been indorsed and forwarded with draft attached to the proposed vendee, and he has paid it and taken over the bill of lading, without notice, and before the goods would have reached their original destination in the ordinary course of shipment, and in the latter circumstances the proposed vendee may recover against the carrier or shipper damages suffered through a delay caused by diverting a shipment and replacing it.¹⁸ A carrier, charged with notice of the purpose of machinery, is rendered liable for unreasonable delay in shipment.¹⁹

§ 2. Usage or course of business.

A regulation of an express company, declining delivery of freight, including dead bodies, from night trains at a small station where no night office is maintained, and providing for carriage to the next station and return the next morning to the destination, is a reasonable rule.²⁰ Where it is a general and uniform custom at

16. *Hendrick's Admr. v. American Express Co.*, 138 Ky. 704, 1 S. W. 1089.

17. *Stone v. Adams Express Co.*, — Ky. —, 122 S. W. 200.

18. *Davidson Development Co. v. Southern Ry. Co.*, 147 N. C. 503, 61 S. E. 381.

19. *St. Louis & S. F. R. Co. v.*

Farmers' Union Gin Co., 34 Okl. 270, 125 Pac. 894.

20. *Adams Express Co. v. Hibbard*, 145 Ky. 818, 141 S. W. 397.

An express company was not bound to inform the consignee of a dead body of a rule preventing delivery at night at a station where no night office was maintained. *Id.*

a place to which freight is consigned not to give notice of arrival or to make delivery on the Fourth of July, negligence cannot be predicated on the failure of a carrier to give notice or make delivery on that day.²¹ Where the custom between the parties is that a bill of lading with directions shall be given before the goods are forwarded, it cannot be held that, because packages loaded on the claimants' car were addressed in the usual way to the depot quartermaster in New York, this imposed on the railroad the duty of immediate shipment.²²

§ 3. Diligence required of carrier.

A carrier is bound to do all that is reasonable and use all reasonable means by increasing the number of its tracks and warehouses to accommodate its increased business.²³ The rule that a carrier is an insurer of safe delivery does not apply to liability for delay of transportation; reasonable care only being required to avoid delay.²⁴ A carrier must transport property received for transportation with due diligence.²⁵ Freight must be transported with all reasonable diligence where no time for delivery is expressly agreed upon.²⁶ The law implies a contract on the part of a carrier to deliver a shipment with reasonable promptness, and without unnecessary delay.²⁷ A carrier was not liable for delay in the transportation of corn, if ordinary care and diligence was used in the transportation and delivery thereof to the consignee.²⁸ Notice to a carrier of special circumstances which would result in special

21. *Pennsylvania R. Co. v. Naive*, 112 Tenn. 239, 79 S. W. 124, 64 L. R. A. 443.

22. *Louisville & N. R. Co. v. United States*, 39 Ct. Cl. (U. S.) 405.

23. *Joyes v. Pennsylvania R. Co.*, 235 Pa. 232, 83 Atl. 1016.

24. *Delaney v. United States Express Co.*, 70 W. Va. 502, 74 S. E. 512.

25. *St. Louis, etc., Ry. Co. v. State*, 84 Ark. 150, 104 S. W. 1106.

26. *Harby v. Southern Ry. Co.*, 75 S. C. 321, 55 S. E. 760; *Hoffman v. Delaware, etc., R. Co.*, 39 Pa. Super. Ct. 47.

27. *St. Louis & S. F. R. Co. v. Pearce*, 82 Ark. 353, 101 S. W. 760.

28. *St. Louis S. W. Ry. Co. v. Thompson* (Tex. Civ. App.), 103 S. W. 684.

damages to a shipment from delay in transportation of machinery imposes on the carrier the duty to use diligence commensurate with the requirements of the case, which duty the carrier performs when he uses reasonable diligence to forward the goods promptly.²⁹ The words "promptly and without delay," used to define a carrier's duty with reference to the transportation of goods, mean "with reasonable promptness, and without unreasonable delay."³⁰ It is the duty of a carrier to make provisions for operating its trains in all kinds of weather that may be reasonably expected in the particular latitude in which it is operating.³¹ It is the duty of a common carrier to forward goods delivered for transportation promptly and without unreasonable delay.³² It is the duty of a carrier to exercise ordinary diligence to transport and deliver with promptness goods and freight delivered to it for transportation.³³

§ 4. Liability where there is a special contract.

It is a well settled rule that where the law creates a duty or charge, and the party is disabled from performing it without any default in himself, and has no remedy over, then the law will excuse him; but where the party, by his own contract, creates a duty or charge upon himself, he is bound to make it good, notwithstanding any accident or delay by inevitable necessity, because he might have provided against it by contract.³⁴ Where a carrier, therefore, undertakes, by special contract, to transport and deliver goods within a specified time, it is bound to do so, and is liable for a failure to deliver within the prescribed time, and is not excused by an inevitable accident or other contingency, although not fore-

29. *Chicago, etc., Ry. Co. v. Planters' Gin & Oil Co.*, 88 Ark. 77, 113 S. W. 352.

30. *Burlingame v. Adams Express Co.*, 171 Fed. 902.

31. *Cleveland, etc., Ry. Co. v. Heath*, 22 Ind. App. 47, 53 N. E. 198.

32. *Bibb Broom Corn Co. v. Atchison, etc., Ry. Co.*, 94 Minn. 269, 102

N. W. 709, 69 L. R. A. 509, 110 Am. St. Rep. 361.

33. *Houston & T. C. Ry. Co. v. Foster* (Tex. Civ. App.), 86 S. W. 44.

34. *Beebe v. Johnson*, 19 Wend. (N. Y.) 500; *Shubrick v. Salmond*, 3 Burr. 1637; *Hadley v. Clarke*, 8 T. R. 259; *Hand v. Baynes*, 4 Whart. (Pa.) 204, 33 Am. Dec. 54.

seen by or within the control of the carrier. The fault of the complaining party only will excuse it.³⁵ No temporary obstruction, or even the absolute impossibility of complying with the engagement will be a defense to an action for failure in performing the contract.³⁶ A carrier cannot avoid liability for breach of its contract to receive and transport cattle at a certain time, by reason of its freedom from negligence in respect to the delay, in the

35. N. Y.—New York Cent., etc., R. Co. v. Standard Oil Co., 87 N. Y. 487, 492; McPherson v. Cox, 86 N. Y. 479; Harmony v. Bingham, 12 N. Y. 99, 62 Am. Dec. 142; Van Buskirk v. Roberts, 31 N. Y. 661; Nelson v. Odiorne, 45 N. Y. 489; Place v. Union Express Co., 2 Hilt. (N. Y.) 19.

U. S.—The Harriman, 9 Wall. (U. S.) 161.

Ill.—Illinois Cent. R. Co. v. Simmons, 49 Ill. App. 443; Chicago, etc., R. Co. v. Thrapp, 5 Ill. App. 502.

Ind.—Pittsburgh, etc., R. Co. v. Racer, 5 Ind. App. 209.

Iowa.—Wood v. Chicago, etc., R. Co., 68 Iowa, 491, 24 Am. & Eng. R. Cas. 91, 56 Am. Rep. 861.

Mass.—Knowles v. Dabney, 105 Mass. 437; Higginson v. Weld, 14 Gray (Mass.), 165; Tirrell v. Gage, 4 Allen (Mass.), 251; Wareham Bank v. Burt, 5 Allen (Mass.), 113; Gage v. Tirrell, 9 Allen (Mass.), 299.

Miss.—Jemison v. McDaniel, 25 Miss. 83.

Mo.—Myres v. Diamond Joe Line, 58 Mo. App. 199; Harrison v. Missouri Pac. R. Co., 74 Mo. 364, 41 Am. Rep. 318, 7 Am. & Eng. R. Cas. 382; Collier v. Swinney, 16 Mo. 484; Miller v. Chicago, etc., R. Co., 1 Mo. App. Rep. 474.

N. H.—Deming v. Grand Trunk R. Co., 48 N. H. 455, 2 Am. Rep. 267.

Pa.—Hand v. Baynes, 4 Whart. (Pa.) 204, 33 Am. Dec. 54.

Tex.—Gulf, etc., R. Co. v. McCorquodale, 71 Tex. 41, 35 Am. & Eng. R. Cas. 653; Gulf, etc., R. Co. v. Hodge (Tex. Civ. App.), 30 S. W. 829; Texas Pac. R. Co. v. Nicholson, 61 Tex. 491, 21 Am. & Eng. R. Cas. 133.

Eng.—Denton v. Great Northern R. Co., 5 El. & Bl. 860, 85 E. C. D. 860, 2 Jur. N. S. 185; Hawcroft v. Great Northern R. Co., 16 Jur. 196, 21 L. J. Q. B. 178; Robinson v. Dunmore, 2 B. & P. 416.

36. Harrison v. Missouri Pac. R. Co., supra; Miller v. Chicago, etc., R. Co., supra; Harmony v. Bingham, supra, where a public canal was rendered impassible by an unusual freshet; Parmelee v. Wilks, 22 Barb. (N. Y.) 539; Hodgdon v. New York, etc., R. Co., 46 Conn. 277, 33 Am. Rep. 21, where a harbor was frozen; Aylward v. Smith, 2 Lowell (U. S.), 192; Parker v. Winslow, 7 El. & Bl. 942, 90 E. C. L. 942, low water no defense.

Effect of stipulations.—In a contract of a common carrier for the transportation of perishable goods, a stipulation by the consignee to pay a sum in addition to the regular

absence of a proviso to that effect.³⁷ But a carrier is not liable for breach of its contract to deliver a car at a certain place at a specified time, the delay being caused by the shipper's failure to comply with the requirement of the contract that the car be loaded in time to be sent out on a certain day;³⁸ or by some other act of the complaining party without fault of the carrier.³⁹ Ordinarily the bill of lading constitutes the contract of shipment and the party alleging a contract to transport by a certain day must prove the contract.⁴⁰ Whether there was such a special contract may be a question for the jury under the circumstances of a given case.⁴¹ Where a bill of lading provides for shipment upon one of two vessels, the carrier is not liable for delay because of a shipment on the vessel departing later, where, upon the undisputed facts, the goods were not presented for transportation within such reasonable time as to make it the carrier's duty to ship by the vessel going earlier, and a receipt for the goods, which is a mere acknowledgment that the property has passed into the custody of the carrier, and is to

freight, if the property should be delivered by a certain date, does not constitute an agreement to deliver the goods by that date. *Carr v. Schafer*, 15 Colo. 48, 24 Pac. 873.

Where the carrier agrees to deduct a certain sum from the freight for each day's delay beyond the time specified for delivery, this is not an alternative covenant to that for the transportation of the property, but is in the nature of liquidated damages for the non-performance of the covenant for transportation. *Harmony v. Bingham*, 12 N. Y. 99, 62 Am. Dec. 142.

Rescission of contract.—Where one contracted with the freight agent of a railroad company, for the transportation of goods upon a particular day and train, it is no evidence of a sub-

sequent rescission of such contract, that he was subsequently informed by another person "in the employ of the company," that the goods could not be sent by that train if the cars should be full, it not appearing that such person was a freight agent of the company. *Curtis v. Chicago, etc., R. Co.*, 18 Wis. 312.

37. *Gann v. Chicago, etc., R. Co.*, 72 Mo. App. 34.

38. *Stoner v. Chicago, etc., R. Co.*, 109 Iowa, 551, 80 N. W. 569.

39. *Thompson v. Midland R. Co.*, 122 Ala. 378, 24 So. 931.

40. *Bedell v. Richmond, etc., R. Co.*, 94 Ga. 22.

41. *Pickford v. Grand Junction R. Co.*, 12 M. & W. 766; *International, etc., R. Co. v. Wentworth*, 87 Tex. 311

be surrendered upon the receipt of the bill of lading, cannot vary the contract or change the rights of the parties as fixed by the bill of lading.⁴² A written transportation contract which is silent as to the time of shipment contains an implied obligation to ship within a reasonable time after the goods are delivered, and cannot be modified by parol evidence of an undertaking to ship on a certain train.⁴³

§ 5. Liability where there are special instructions by the shipper.

If the common carrier receives goods with orders to "ship immediately," or to "forward presently," and the goods are stored in its warehouse or depot on account of the obstruction to navigation or transportation, or for the convenience of the carrier, and while there consumed by fire, it is liable for their value.⁴⁴ Where a cartman, without authority from the owner of the goods, gives the carrier directions in regard to them, different from instructions previously given by the owner, the company is not protected by them.⁴⁵ An agreement by a shipper to permit his goods to be sent to a destination different from that agreed upon in a bill of lading, after a failure on the part of the carrier to comply with its contract, will not prevent him from recovering the damages which may have resulted from the breach of the contract made by the carrier.⁴⁶

§ 6. Liability under statutes requiring prompt forwarding of freight.

Statutes relating to railroad companies as carriers which require them to furnish suitable cars, on reasonable notice, when within their power to do so, are merely declaratory of the common

42. *Fowler v. Liverpool, etc., Steam Co.*, 87 N. Y. 190, 9 Am. & Eng. R. Cas. 235, 37 Fed. 434.

43. *Pennsylvania Co. v. Clark*, 2 Ind. App. 146, 28 N. E. 208, 27 N. E. 586.

44. *Clark v. Needles*, 25 Pa. St. 338; *Moses v. Boston, etc., R. Co.*, 24 N. H. (4 Fost.) 71.

45. *Moses v. Boston, etc., R. Co.*, *supra*.

46. *Skellie v. Central, etc., R. Co.*, 81 Ga. 56, 6 S. E. 811.

law duty of the carrier, though providing better for the enforcement of it.⁴⁷ In a suit under such a statute to recover for a delay in furnishing cars, the complainant must aver reasonable notice, and that it was within the power of the company, at the time, to furnish suitable cars.⁴⁸ In the exercise of its general police power, the legislature can constitutionally impose on railroads within the State a penalty for each day's delay to transport goods duly delivered to them for the purpose,⁴⁹ and such a statute is not an unconstitutional regulation of interstate commerce as to freight for shipment out of the State, as it does not tend to trammel or obstruct, but to expedite, such commerce.⁵⁰ The five days within which, under the North Carolina statute, a railroad company must forward freight or answer in damages, are five full running days, exclusive of the day of delivery and the day of shipment, and including Sunday when it intervenes.⁵¹ It is not a good defence to an action under the statute for failure to ship promptly, or to an action for breach of contract to furnish cars for shipment of goods at a certain date, that the accumulation of freight or the shipment of goods over the line at that time was so great that the carrier did not have or was unable to secure the necessary cars for shipment.⁵² But where the bill of lading contained a clause that the goods were to be shipped "at the company's convenience," the carrier was held not liable to the penalty under similar cir-

47. *Houston, etc., R. Co. v. Smith*, 63 Tex. 322, 22 Am. & Eng. R. Cas. 421. See also, § 10, chap. 3.

48. *Richardson v. Chicago, etc., R. Co.*, 61 Wis. 596, 18 Am. & Eng. R. Cas. 530.

49. *Branch v. Wilmington, etc., R. Co.*, 77 N. C. 347; *McGowan v. Wilmington, etc., R. Co.*, 95 N. C. 417, 27 Am. & Eng. R. Cas. 64; *Whitehead v. Wilmington, etc., R. Co.*, 87 N. C. 255, 9 Am. & Eng. R. Cas. 168; *Katzenstein v. Raleigh, etc., R. Co.*,

84 N. C. 688, 6 Am. & Eng. R. Cas. 464.

50. *Bagg v. Wilmington, etc., R. Co.*, 109 N. C. 279, 26 Am. St. Rep. 569, 49 Am. & Eng. R. Cas. 46; *Keeter v. Wilmington, etc., R. Co.*, 86 N. C. 346, 9 Am. & Eng. R. Cas. 167.

51. *Branch v. Wilmington, etc., R. Co.*, 88 N. C. 570.

52. *Keeter v. Wilmington, etc., R. Co.*, *supra*; *Gulf, etc., R. Co. v. Hume*, 6 Tex. Civ. App. 653, 27 S. W. 110.

cumstances, which the company could not have been expected to provide against.⁵³ Though a carrier delays the delivery of freight for four months, the consignee must accept it when tendered and rely on his right to recover for negligent delay, notwithstanding a statute making a carrier liable for loss of or damage to goods and a penalty for failure to adjust the claim therefor within a time limited.⁵⁴

§ 7. Delay in delivering perishable freight.

Under the common law the obligation of a common carrier receiving perishable freight for transportation was to forward it immediately to its destination. In New York there was a statute in force imposing this duty (Chap. 140, § 36, Laws 1850), which was repealed by the Railroad Act of 1892, but the common law obligation still remains to receive and transport the freight within a reasonable time, considering its character, to the place of destination.⁵⁵ Where the goods are perishable or are peculiarly liable to injury from delay, the carrier is bound to take reasonable means to guard against such injuries and to use special diligence to avoid delay in its transportation.⁵⁶ The carrier is not liable for injuries

53. *Whitehead v. Wilmington, etc., R. Co.*, 87 N. C. 255, 9 Am. & Eng. R. Cas. 168.

54. *Bullock v. Charleston, etc., Ry. Co.*, 82 S. C. 375, 64 S. E. 234.

55. *Tierney v. New York Cent., etc., R. Co.*, 76 N. Y. 308; *Aetna Insurance Co. v. Wheeler*, 49 N. Y. 616; *Mills v. Michigan Cent. R. Co.*, 45 N. Y. 622; *Livingston v. New York Cent., etc., R. Co.*, 76 N. Y. 631; *Cartwright v. Rome, etc., R. Co.*, 85 Hun (N. Y.), 517, 33 N. Y. Supp. 147; *Cantwell v. Pacific Express Co.*, 58 Ark. 487, 61 Am. & Eng. R. Cas. 206, note; *McAndrew v. Whitlock*, 52 N. Y. 40.

56. *Michigan Cent. R. Co. v. Cur-*

tis, 80 Ill. 324; *Missouri Pac. R. Co. v. Cornwall*, 70 Tex. 611, 8 S. W. 312; *Sherman v. Inman Steamship Co.*, 26 Hun (N. Y.), 107; *St. Clair, etc., R. Co. v. Chicago, etc., R. Co.*, 80 Iowa, 304, 42 Am. & Eng. R. Cas. 414; *Central, etc., R. Co. v. Avant*, 80 Ga. 195, 32 Am. & Eng. R. Cas. 475; *Blodgett v. Abbot*, 72 Wis. 516, 7 Am. St. Rep. 873, carriage over connecting line; *McGraw v. Baltimore, etc., R. Co.*, 18 W. Va. 361, 9 Am. & Eng. R. Cas. 188, 41 Am. Rep. 696; *Hewett v. Chicago, etc., R. Co.*, 63 Iowa, 611, 18 Am. & Eng. R. Cas. 568; *Wood v. Chicago, etc., R. Co.*, 68 Iowa, 491, 56 Am. Rep. 861, 24 Am. & Eng. R. Cas. 91, the carrier

caused by intrinsic defects or inherent qualities in such goods.⁵⁷ And the owner of such goods who chooses to ship them under circumstances where they are apt to be exposed to risks, in the absence of a special contract otherwise, assumes the risks incident to ordinary transportation.⁵⁸ Generally it is the duty of a carrier to forward perishable property as speedily as the exigencies of its freight traffic will permit, even to the exclusion of other general freight not of a perishable nature.⁵⁹ There is no invariable rule requiring freight to be carried in the order in which it is received, without regard to its character or condition, or its liability to perish, and it is quite generally held that the carrier may and should give preference in transportation to perishable goods over non-perishable goods, if it is unable to forward both at once.⁶⁰ If an unavoidable delay occurs, the carrier must exercise sound discretion and reasonable diligence in forwarding perishable goods to their destination. If it does not appear, in the exercise of such discretion, that a change of route would prevent the loss attendant upon delay, it is not bound to divert the goods to a route over which it has no control. It may sell the goods for the best price it can obtain, and thus convert what would be inevitably a total loss to the shipper into one that is partial merely.⁶¹ A carrier,

is bound by the oral contract of a station agent having express authority.

57. *American Express Co. v. Smith*, 33 Ohio St. 511, 31 Am. Rep. 561; *Evans v. Fitchburg R. Co.*, 111 Mass. 142; *Brown v. Clayton*, 12 Ga. 580; *Ship Howard v. Wissman*, 18 How. (U. S.) 231; *The Brig Collenberg*, 1 Black (U. S.), 170; *Warden v. Greer*, 6 Watts (Pa.), 424.

58. *Swetland v. Boston, etc., R. Co.*, 102 Mass. 276.

59. *Dixon v. Chicago, etc., R. Co.*, 64 Iowa, 531, 18 Am. & Eng. R. Cas. 526, 52 Am. Rep. 460; *Ballentine v.*

North Missouri R. Co., 40 Mo. 491, 93 Am. Dec. 315.

60. *Marshall v. New York Cent. R. Co.*, 45 Barb. (N. Y.) 502, affd. 48 N. Y. 660; *Tierney v. New York Cent., etc., R. Co.*, 76 N. Y. 305, affg. 10 Hun (N. Y.), 569, 67 Barb. (N. Y.) 538; *Cooper v. Kane*, 19 Wend. (N. Y.) 386, 32 Am. Dec. 512; *Peet v. Chicago, etc., R. Co.*, 20 Wis. 594, 91 Am. Dec. 446; *Michigan Cent. R. Co. v. Burrows*, 33 Mich. 6; *Great Western R. Co. v. Burns*, 60 Ill. 284.

61. *American Express Co. v. Smith*, 33 Ohio St. 511, 31 Am. Rep. 561.

on receiving fruit for transportation, is bound to forward it to its destination immediately.⁶² Hay not being perishable merchandise, a carrier is not called upon to put forth unusual efforts to remove the same when delivered to it for transportation.⁶³ An express company is liable for damages to fruit injured by delay in its transportation.⁶⁴ Where a carrier's agent consented, when requested, to place a car of perishable fruit in position for unloading and failed to do so and the fruit decayed, the carrier was liable for its negligent failure.⁶⁵ A carrier of perishable fruit owes only the duty of exercising reasonable care to protect it from injury, in the absence of any special contract as to the time of delivery.⁶⁶ Under a statute providing that trains laden exclusively with vegetables and fruit may run on Sunday, and such freight trains as may be in transit which can reach their destination by six o'clock in the forenoon may run on Sunday, a carrier of perishable fruit may not excuse a delay in the transportation on Sunday in the absence of testimony explaining why a train did not go to the point of destination on Saturday evening, and why such train or another train could not reach the destination before six o'clock Sunday morning.⁶⁷

§ 8. Delay must have been the proximate cause of injury.

A common carrier is not liable to a shipper or consignee for loss or injury resulting from delay in the shipment or transportation of goods, unless the delay was the proximate cause of the loss or

62. *Frey v. New York Cent., etc.*, R. Co., 114 App. Div. (N. Y.) 747, 100 N. Y. Supp. 225.

63. *Strough v. New York Cent., etc.*, R. Co., 181 N. Y. 533, 73 N. E. 1133, affg. judg. 92 App. Div. 584, 87 N. Y. Supp. 30.

64. *Adams Express Co. v. Williams*, — Ark. —, 14 S. W. 40.

65. *Texas & P. Ry. Co. v. Payne* (Tex. Civ. App.), 156 S. W. 1126.

Facts held insufficient to warrant a finding of damage by reason of delay. *San Antonio, etc., Ry. Co. v. Thompson* (Tex. Civ. App.), 66 S. W. 792.

66. *Pennsylvania R. Co. v. Clark*, 118 Md. 514, 85 Atl. 613.

67. *Trakas v. Charleston & W. C. Ry. Co.*, 87 S. C. 206, 69 S. E. 209.

injury, as, for example, where the goods were destroyed or injured by fire, for which the carrier was not responsible, although the goods were exposed to loss or injury by negligent delay in transmission, the delay not being shown to be the proximate cause of the loss or injury.⁶⁸ But the carrier is liable in all cases where the delay is shown to have been the proximate cause, as, where the carrier negligently allowed compressed cotton to accumulate in large quantities and failed to transport it promptly, or permitted it to lie on the platform where engines were constantly passing, the negligent delay in removing the cotton from a place of necessary danger being the proximate cause of loss.⁶⁹ So, if a common carrier negligently fails to transport merchandise within a reasonable time, and the market price falls, the negligent delay, although it does not cause the decline in the general market, deprives the owner of his right to the higher market price, and thus is the proximate cause of this loss to him.⁷⁰ A verdict against a carrier

68. *Yazoo, etc., R. Co. v. Millsaps*, 76 Miss. 855, 71 Am. St. Rep. 542, 25 So. 672; *Thomas v. Lancaster Mills*, 34 U. S. App. 404, 71 Fed. 481, 19 C. C. A. 88; *Morrison v. Davis*, 20 Pa. St. 171, 57 Am. Dec. 701, note; *Scott v. Baltimore, etc., Steamboat Co.*, 19 Fed. 56.

A railroad company is not liable for injury to freight resulting from exposure to mud and rain, in consequence of the company's violation of its contract with the road over which the freight was shipped to maintain a narrow guage track for the benefit of that road, as the exposure and not the failure to maintain the track is the proximate cause of injury. *St. Louis, etc., R. Co. v. Neel*, 56 Ark. 279, 55 Am. & Eng. R. Cas. 428, 19 S. W. 963, 12 Ry. & Corp. L. J. 110.

But a common carrier is liable for the loss of a shipment by fire which

would not have occurred if it had shipped the property immediately as it agreed to do. *Hernsheim v. Newport News, etc., R. Co.*, 18 Ky. L. Rep. 227, 35 S. W. 1115.

69. *Marine Ins. Co. v. St. Louis, etc., R. Co.*, 41 Fed. 643, 43 Am. & Eng. R. Cas. 79, 19 Ins. L. J. 379, 695; *Missouri, etc., R. Co. v. McFadden*, 89 Tex. 138, 33 S. W. 853.

70. *Ward v. New York Cent. R. Co.*, 47 N. Y. 29, 7 Am. Rep. 405; *Zinn v. New Jersey Steamboat Co.*, 49 N. Y. 442, 10 Am. Rep. 402; *Sherman v. Hudson River R. Co.*, 64 N. Y. 259; *Dunham v. Boston, etc., R. Co.*, 70 Me. 164, 35 Am. Rep. 314; *Kent v. Hudson River R. Co.*, 22 Barb. (N. Y.) 278; *Medbury v. New York, etc., R. Co.*, 26 Barb. (N. Y.) 564, overruling *Wibert v. New York, etc., R. Co.*, 19 Barb. (N. Y.) 36; *Jones v. New York, etc., R. Co.*, 29

for delay in transporting perishable merchandise will be sustained where it is admitted that the goods were in good condition when placed in the car, but were worthless when the car was opened after it arrived at its destination, and the evidence is conflicting on other points.⁷¹ It is not error to submit to the jury the question whether a delay of three days was the cause of the loss of perishable goods, where three witnesses experienced in shipping, testified that when the car was opened the goods indicated that decay had commenced within two or three days.⁷²

§ 9. Waiver of right of action for delay.

A delay probably injurious being shown, it is admissible to show that, before starting, the plaintiff consented to a delay, if necessary, and such consent will constitute a waiver of any right of action against the carrier for negligent delay in the transportation.⁷³ A demand for or acceptance of the goods, in whole or part, after the accrual of a right of action for delay is not a waiver of the right of action for damages for the delay.⁷⁴ Interference by the owner, by giving directions as to the care of property which is stopped by the freezing of a river, is not, conclusively, an acceptance of the property.⁷⁵

§ 10. Excuses for delay generally.

In the absence of a special contract, the carrier is liable only

Barb. (N. Y.) 633; *Kirkland v. Leary*, 2 Sw. (N. Y.) 677. And the measure of damages is the difference in value at the place of delivery at the time when it ought to have been delivered and at the time of actual delivery. *Id.* Louisville, etc., R. Co. v. Heilprin, 95 Ill. App. 402.

71. *St. Clair v. Chicago, etc., R. Co.*, 80 Iowa, 304, 45 N. W. 570, 42 Am. & Eng. R. Cas. 414.

72. *Ruppel v. Alleghany Valley R. Co.*, 167 Pa. St. 166, 25 Pitts. L. J.

N. S. 403, 36 W. N. C. 210, 31 Atl. 478, 46 Am. St. Rep. 666.

73. *Johnson v. Lightsey*, 34 Ala. 169, 73 Am. Dec. 450.

74. *Georgia R. Co. v. Cole*, 68 Ga. 623; *Lowe v. Moss*, 12 Ill. (2 Peck) 477; *Nudd v. Wells*, 11 Wis. 407; *Norfolk, etc., R. Co. v. Shippers Compress Co.*, 83 Va. 272, 2 S. E. 139, 30 Am. & Eng. R. Cas. 57.

75. *Bowman v. Teall*, 23 Wend. (N. Y.) 306, 35 Am. Dec. 562.

for negligent delay, and is not liable for delay resulting from a cause not due to its own want of care or diligence. It is the duty of a common carrier to convey the goods without an unnecessary delay or deviation; but it may be necessary for the safe carriage of the goods that it should either delay, or deviate in its course, and it is then justified in so doing. In respect to the time to be occupied in transporting property, the carrier is not held to the extraordinary liability to which it is held for its safety while in its custody, and it may excuse delay in its delivery by proof of misfortune or accident, although not inevitable or produced by the act of God.⁷⁶ Where there is a special contract for delivery within a fixed time, as we have seen, the only excuse for delay that is valid is that the delay was due to the fault of the party with whom the contract was made.⁷⁷ A carrier is not responsible for failure to deliver in due time, if prevented by inevitable accident, such as a railroad collision or blockade occurring on the line of

76. *Geismer v. Lake Shore, etc.*, R. Co., 102 N. Y. 563, 55 Am. Rep. 837, 26 Am. & Eng. R. Cas. 287, revg. 34 Hun (N. Y.), 50; *Livingston v. New York Cent., etc.*, R. Co., 5 Hun (N. Y.), 562, a railroad company is not liable for delay caused by the breaking down of a freight car on another line; *Parsons v. Hardy*, 14 Wend. (N. Y.) 215, 28 Am. Dec. 521; *Lowe v. East Tennessee, etc.*, R. Co., 90 Ga. 85; *Johnson v. East Tennessee, etc.*, R. Co., 90 Ga. 810; *Truax v. Philadelphia, etc.*, R. Co., 3 Houst. (Del.) 233; *Kinnick v. Chicago, etc.*, R. Co., 69 Iowa, 665, 27 Am. & Eng. R. Cas. 55; *Dixon v. Chicago, etc.*, R. Co., 64 Iowa, 531, 52 Am. Rep. 460, 18 Am. & Eng. R. Cas. 425; *International, etc.*, R. Co. v. *Hynes*, 3 Tex. Civ. App. 20; *Gerhard v. Neese*, 36 Tex. 635; *Conkey v. Milwaukee, etc.*, R. Co., 31 Wis. 619, 2 Am. Ry.

Rep. 353, 11 Am. Rep. 630; *American Express Co. v. Smith*, 33 Ohio St. 511, 31 Am. Rep. 561; *Nashville, etc.*, R. Co. v. *Jackson*, 6 Heisk. (Tenn.) 271, 12 Am. Ry. Rep. 54; *Lamont v. Nashville, etc.*, R. Co., 9 Heisk. (Tenn.) 58, 19 Am. Ry. Rep. 284; *Whitworth v. Erie R. Co.*, 87 N. Y. 413, 6 Am. & Eng. R. Cas. 349, a carrier is not liable for delay caused by the neglect of a succeeding carrier to receive the goods when tendered; *Wallace v. Dublin, etc.*, R. Co., 8 Ir. R. C. L. 341; *Taylor v. Great Northern R. Co.*, L. R. 1 C. P. 386, 12 Jur. N. S. 372, 14 W. R. 639; *Davis v. Garrett*, 6 Bing. 716, 19 E. C. L. 212; *Hadley v. Clarke*, 8 T. R. 259.

77. *Harrison v. Missouri Pac. R. Co.*, 74 Mo. 364, 7 Am. & Eng. R. Cas. 382, 41 Am. Rep. 318. See also cases cited under § 4, *ante*.

another company, or without fault or negligence on the part of the carrier.⁷⁸ Proof by the consignee of a delay in delivery establishes a *prima facie* case, and puts the burden on the carrier to prove circumstances excusing the delay, by showing that it was due to causes for which it was not responsible.⁷⁹ A carrier cannot justify a delay in delivery from a failure to place a solid car shipment where it could be unloaded after its arrival on the ground that the consignee did not tender the freight, unless notice was given of the arrival of the car and a demand made for the freight.⁸⁰ Where a carrier accepted an automobile for shipment, it is liable for an unreasonable delay in the shipment and its temporary inability to secure a car large enough to hold the automobile will not exonerate it.⁸¹ Where the breach of a carrier's undertaking was alleged to be a failure to exercise due care and diligence in making delivery, the carrier could allege as a defense any facts which the law recognizes as an excuse for delay, though no exemption from liability on such ground was in the contract of shipment.⁸² A carrier will not be excused from liability for the consequences of an unusual delay in transportation caused by an act of God, where the disability is existent and known to the carrier at the time the property is received for shipment, and the carrier fails to advise the shipper of the existing conditions and to stipulate against their consequences.⁸³ Where a carrier was liable for injuries to a shipment of corn, because it was bound to deliver the

78. *Conger v. Hudson River R. Co.*, 6 Duer (N. Y.), 375; *Taylor v. Great Northern R. Co.*, *supra*.

79. *Place v. Union Express Co.*, 2 Hilt. (N. Y.) 19; *St. Clair v. Chicago, etc., R. Co.*, 80 Iowa, 304, 42 Am. & Eng. R. Cas. 414; *Mann v. Birchard*, 40 Vt. 326. See also Burden of proof, chap. 14.

80. *Georgia, etc., Ry. Co. v. Elliott*, 3 Ga. App. 773, 60 S. E. 363.

81. *Grigsby v. Texas & P. Ry. Co.* (Tex. Civ. App.) 137 S. W. 709.

82. *Missouri, etc., Ry. Co. of Texas v. Stark Grain Co.*, 103 Tex. 542, 131 S. W. 410, modifying (Civ. App.) 120 S. W. 1146, to relieve a carrier from liability for delay in delivery due to a congestion of traffic, the shipper must be notified of such condition before the shipment is received, in the absence of an express agreement of exemption.

83. *Thero v. Missouri Pac. Ry. Co.*, 144 Mo. App. 161, 129 S. W. 266.

corn in a reasonable time, where the consignee called for the same within a reasonable time, notifying the carrier that the corn was shipped to be dried, and required immediate handling, the refusal to deliver because there were other car loads of grain that had precedence under its rule did not relieve it from liability.⁸⁴ Results attributed to a defective roadbed and defective equipment afford no excuse for the nonperformance of a carrier's duty to safely deliver a shipment at its destination within a reasonable time.⁸⁵ Railroad companies are not responsible for delays occasioned by accidents, but are responsible where such delays are attributable to their own negligence.⁸⁶ Railroads are not bound to be prepared for unusual and extraordinary contingencies, such as the great Chicago fire, which no ordinary prudence or foresight could reasonably foresee or anticipate.⁸⁷ When a superintendent of a railroad receives an order relating to passengers, to the effect that trains will not be allowed to stop at a quarantined town, he has a reasonable time to ascertain whether the order applies to freight, before the road can be held liable for receiving goods which it cannot deliver.⁸⁸ Where the carrier recognized the transfer of title to goods in its possession by the consignee, without asking for the production and surrender of the bill of lading, and agreed to deliver, and did deliver, the property to the buyer after an unreasonable delay, it was no defense to the buyer's right to recover for such delay that it could not require defendant to carry out its contract for failure to show an assignment of the bill of lading.⁸⁹ A carrier will not be relieved from liability to the owner

84. *W. R. Hall Grain Co. v. Louisville & N. R. Co.*, 148 Mo. App. 308, 128 S. W. 42.

A carrier delaying the delivery of freight may not excuse the delay on the ground that the bills of lading were not presented, where it did not decline to deliver because thereof. *Id.*

85. *Thompson v. Quincy, etc., R. Co.*, 136 Mo. App. 404, 117 S. W. 1193.

86. *St. Louis & S. F. R. Co. v. Dean*, (Texas Civ. App.) 152 S. W. 1127.

87. *Michigan Cent. R. Co. v. Burrows*, 33 Mich. 6.

88. *Alabama & V. Ry. Co. v. Hayne*, 76 Miss. 538, 24 So. 907.

89. *Russell Grain Co. v. Wabash R. Co.*, 114 Mo. App. 488, 89 S. W. 908.

of goods for failure to transport the goods within a reasonable time by showing that the party whom it was directed by the bill of lading to "notify" instructed it not to deliver the goods; such party not being at the time in the possession of the bill of lading nor entitled to its possession⁹⁰ Where a railway company received freight with charges paid in advance, and at the point of delivery the local agent demanded payment of additional freight charges under a different classification and payment of a former freight bill and refused to deliver the freight until such payment, and after seven days the company made delivery without compelling payment of the claims, the demand for payment for the former shipment and the refusal to deliver preclude any inquiry into the merits of the other demand, and the company is liable for the value of the use of the shipment for the time it was unlawfully withheld.⁹¹ Where property is in the hands of a carrier, and possession is demanded by a stranger to the bill of lading, prior to actual shipment, the carrier, having reasonable doubt as to what party is entitled to possession, may delay immediate shipment to investigate.⁹²

§ 11. Unusual floods and storms.

Where there is no special contract, an unavoidable delay resulting from an unusual flood, or a storm of such magnitude as to obstruct traffic, excuses the carrier from liability for such delay, provided it has exercised proper care to avoid the obstructions occasioned thereby, and proceeds with the transportation and delivery as soon as traffic is practicable.⁹³ A sudden snow storm

90. *Florida Cent. & P. R. Co. v. Berry*, 116 Ga. 19, 42 S. E. 371.

91. *Atchison, etc., Ry. Co. v. Bourdett*, 74 Kan. 137, 85 Pac. 820.

92. *Merz v. Chicago & N. W. Ry. Co.*, 86 Minn. 33, 90 N. W. 7.

93. *Palmer v. Atchison, etc., R. Co.*, 101 Cal. 187, 61 Am. & Eng. R. Cas. 235; *American Express Co. v.*

Smith, 33 Ohio St. 511, 31 Am. Rep. 561; *St. Louis, etc., R. Co. v. Jones*, (Tex. Civ. App.) 29 S. W. 695; *San Antonio, etc., R. Co. v. Barnett*, (Tex. Civ. App.) 27 S. W. 675; *Vicksburg, etc., R. Co. v. Ragsdale*, 46 Miss. 458, 1 Am. Ry. Rep. 407; *J. P. Williams & Co. v. Pensacola, etc., R. Co.*, 57 Fla. 544, 48 So. 630; *Pruit v. Hanni-*

occurring about as a shipment begins is a sufficient excuse for a delay in transportation which is caused thereby.⁹⁴ But the carrier is not relieved from liability for a delay by showing that it was due to an extraordinary and unprecedented flood, where it might have avoided the effects of the flood by the exercise of reasonable diligence and care,⁹⁵ as, for example, where it might have carried a shipment of live stock past the place of a washout, if it had been shipped promptly, or might have shipped the stock over another route.⁹⁶ It is the duty of the carrier, in such cases, to notify the shipper of the obstructions to traffic, so that he may, if he choose, take a different course, and the carrier is liable if loss is sustained which might have been averted by shipping the goods over another line.⁹⁷ The carrier's knowledge of the interruption to its route at the time of its acceptance of the goods for transportation, if not made known to the shipper, may preclude

bal, etc., R. Co., 62 Mo. 527; Norris v. Savannah, etc., R. Co., 23 Fla. 182, 1 So. 475, 28 Am. & Eng. R. Cas. 66, 11 Am. St. Rep. 355; Chicago, etc., R. Co. v. Manning, 23 Neb. 552; Nashville, etc., R. Co. v. King, 6 Heisk. (Tenn.) 269; Nashville, etc., R. Co. v. David, 6 Heisk. (Tenn.) 261, 19 Am. Rep. 594, 12 Am. Ry. Rep. 9; Bridgdon v. Great Northern R. Co., 32 L. T. 94, 28 L. J. Exch. 51.

Where a railway company received a car load of wheat for transportation, and owing to a delay in carriage and delivery at the point of destination, it was still in possession of the company, when a large part of it was destroyed by an unusual storm the company is not liable for the conversion of wheat so destroyed; but if the company recovered a portion of the wheat and retained it an unreasonable time, the company is liable for the conversion of the wheat so recovered and retained. *Gulf, etc.,*

R. Co. v. Darby (Tex. Civ. App.), 67 S. W. 129.

94. *Cunningham v. Wabash R. Co.*, 79 Mo. App. 524, 2 Mo. A. Repr. 465. A heavy dew, delaying a railway train, is not the act of God, relieving the railway company from liability for delay in shipment of cattle. *Missouri, etc., Ry. Co. v. Truskett*, 104 Fed. 728, 44 C. C. C. A. 179, aff'd 186 U. S. 480, 22 Sup. Ct. 943, 46 L. Ed. 1259; (Ind. T.), 53 S. W. 444.

95. *St. Louis, etc., R. Co. v. Bland* (Tex. Civ. App.), 34 S. W. 675.

96. *Gulf, etc., R. Co. v. McCorquodale*, 71 Tex. 41, 9 S. W. 80, 35 Am. & Eng. R. Cas. 653; *Guinn v. Wabash, etc., R. Co.*, 20 Mo. App. 453; *Missouri, etc., R. Co. v. Olive* (Tex. Civ. App.) 23 S. W. 526.

97. *Alabama, etc., R. Co. v. Brichetto*, 72 Miss. 891; *Schwab v. Union Line*, 13 Mo. App. 159.

the defense that delay was due to such interruption by the act of God, especially when rapid and safe transportation could have been made over other lines.⁹⁸ But such knowledge must be shown to have been of a definite character.⁹⁹ Mere failure to give notice of a detention by a flood will not render the carrier liable, however, where delivery was made as soon as possible, and notice would not have benefited the consignor or consignee by avoiding the loss or injury of goods which followed.¹ A railroad company is not liable for damages arising from delay in the shipment of goods, owing to the loss of a car on account of extraordinary weather conditions;² but where a carrier accepts goods, knowing that a congested condition of traffic, due to weather conditions, will delay the transportation, but fails to notify the shipper, it cannot set up such weather conditions as an excuse for its delay.³

§ 12. Accumulation or shortage of cars and congestion of freight.

An accumulation of cars and freight at the place of delivery will not exonerate a carrier from liability for loss by delay upon such railroad, where the carrier had power to remove such obstruction.⁴ The temporary obstruction of the carrier's warehouse by an accumulation of freight does not excuse its delay in delivering goods, where it was within its power, by the exercise of reasonable effort, to have cleared away the obstruction and to have delivered the goods long before it did.⁵ But common carriers are not liable for a delay in the delivery of goods occurring in consequence of

98. *Adams Express Co. v. Jackson*, 92 Tenn. 326, 21 S. W. 666.

99. *Palmer v. Atchison, etc., R. Co.*, 101 Cal. 187, 61 Am. & Eng. R. Cas. 235.

1. *Norris v. Savannah, etc., R. Co.*, 23 Fla. 182, 1 So. 475, 28 Am. & Eng. R. Cas. 66, 11 Am. St. Rep. 355; *Regan v. Grand Trunk R. Co.*, 61 N. H. 579.

2. *Unionville Produce Co. v. Chicago, etc., R. Co.*, 168 Mo. App. 168, 153 S. W. 63.

3. *Unionville Produce Co. v. Chicago, etc., R. Co.*, *supra*.

4. *Illinois Cent. R. Co. v. McClellan*, 54 Ill. 58, 5 Am. Rep. 83; *Illinois Cent. R. Co. v. Cobb*, 64 Ill. 128.

5. *D. Klass Commission Co. v. Wabash R. Co.*, 80 Mo. App. 164, 2 Mo. A. Repr. 545.

an unusual quantity of freight being offered for transportation, and without fault on their part, unless they have expressly contracted to deliver the same within a limited time. They must not, however, be at fault in providing sufficient accommodations for the general traffic of their roads under ordinary circumstances.⁶ When the facilities are inadequate to meet the unusual demands for transportation, the shipper should be informed at the time the goods are offered for transportation, or as soon thereafter as the fact becomes known to the carrier, and if the carrier receives goods for shipment, knowing its lack of adequate facilities to meet the unusual press of business, without informing the shipper of the fact, or is at fault in its duty to have and provide proper and sufficient facilities for transportation, it is liable for all damages sustained by delay in delivery of the goods.⁷ Delay in transporting freight cannot be excused by the fact that crews were taken from freight trains to handle an extraordinary amount of passenger traffic of which the carrier had previous warning and could have provided for.⁸ A carrier failing to notify a shipper of probable delay in shipment by reason of its having unexpectedly received more business than it can accommodate is bound to transport the goods within a reasonable time notwithstanding emergency.⁹ A carrier is not liable for delay caused by a sudden in-

6. *Wibert v. New York, etc., R. Co.*, 12 N. Y. 245, affg. 19 Barb. (N. Y.) 36, 29 Barb. (N. Y.) 635, 2 Sweeny (N. Y.), 683. This rule was held to be true, notwithstanding the general railroad act of 1850, chap. 140, § 36, requiring such companies to furnish sufficient facilities for the transportation of all freight offered. See also *Blackstock v. New York, etc., R. Co.*, 20 N. Y. 48, 75 Am. Dec. 372; *Ballentine v. North Missouri R. Co.*, 40 Mo. 491, 93 Am. Dec. 315; and other cases cited under Facilities for transportation, § 8, chap. 3.

7. *Bussey v. Memphis, etc., R. Co.*, 4 McCrary (U. S.) 405, 13 Fed. 330; *McLaren v. Detroit, etc., R. Co.*, 23 Wis. 138; *Great Western R. Co. v. Burns*, 60 Ill. 284, 12 Am. Ry. Rep. 309. See also Facilities for transportation, § 8, chap. 3.

8. *Daoust & Welch v. Chicago, etc., Ry. Co.*, 149 Iowa, 650, 128 N. W. 1106.

9. *Joynes v. Pennsylvania R. Co.*, 235 Pa. 232, 83 Atl. 1016.

In determining what is a reasonable time for transportation and delivery of freight under ordinary conditions,

crease of business that could not be anticipated by ordinary prudence and foresight;¹⁰ but a shipment having been accepted for transportation without notice to the shipper that there was a shortage of cars and an unprecedented amount of business, the carrier should be held liable for damages for unreasonable delay.¹¹ Where a carrier's failure to transport cotton with reasonable dispatch was caused by an excessive crop, it was not liable for the delay, where it took extraordinary steps to handle the cotton, and the shipper knew at the time it offered the cotton for shipment that, on account of the heavy traffic and large demand for cars, it could not be transported with the usual rapidity.¹² A carrier cannot excuse its failure to move promptly cotton delivered to it for transportation by proving that 80 per cent or more of its equipment was off its line, engaged in the carriage of shipments offered along the line for other points in other states, for which reason it did not have sufficient equipment to promptly move the cotton, though by having in its possession 75 per cent of its equipment it could have moved all freight offered.¹³ Where, at the time defendant accepted certain oats for shipment, it had knowledge that traffic was demoralized in its yards at the point of destination, but neglected to notify the shipper of such fact, defendant was bound to make delivery in the ordinary course of business, and was liable for damages sustained by delay.¹⁴ Where the agent of

under a contract fixing no time, extraordinary conditions, not known to the shipper at the time of shipment, cannot enlarge the time. *Texas & P. Ry. Co. v. Langbein*, (Tex. Civ. App.) 150 S. W. 1188.

10. *Baker v. St. Louis & S. F. R. Co.*, — Mo. App. —, 129 S. W. 436, but it may not escape a liability for delay in furnishing cars on the ground of a car famine resulting from an extension of the carrier's mileage and a natural increase in business.

11. *Missouri, etc., Ry. Co. of Texas*

v. Early-Clement Grain Co., (Tex. Civ. App.) 124 S. W. 1015.

12. *Yazoo & M. V. R. Co. v. Blum*, — Miss. —, 42 So. 282; *Yazoo & M. V. R. Co. v. McKay*, 91 Miss. 138, 44 So. 780.

13. *St. Louis S. W. Ry. Co. v. Phoenix Cotton Oil Co.*, 88 Ark. 594, 115 S. W. 393. See also *Yazoo & M. V. R. Co. v. Blum Co.*, 88 Miss. 180, 40 So. 748, 10 L. R. A. (N. S.) 432.

14. *Russell Grain Co. v. Wabash R. Co.*, 114 Mo. App. 488, 89 S. W. 908.

a railroad company, knowing of a congestion of freight in the company's yards, preventing delivery of a consignment of apples, promises the consignee to make the delivery, thereby preventing the consignee from himself removing them, the company is liable for the failure to promptly deliver, the congestion of freight being no defense.¹⁵

§ 13. Low water or freezing of waterway.

Where goods are to be transported by water, and, owing to the state of the river, cannot be taken by water to their destination, the carrier is not bound to forward them overland, and, if there has been no want of diligence, is not answerable for delay, if the goods finally arrive safely.¹⁶ Where transportation by water was impeded in midvoyage by low water and the carrier was obliged to land and store the goods at an intermediate port, the carrier was not liable for delay, and, if the owner accepts them at the latter place and pays all charges for freight and storage, the carrier is discharged from all subsequent liability on account of its contract.¹⁷

15. *Southern Ry. Co. v. Deakins*, 107 Tenn. 522, 64 S. W. 477.

Where freight is accepted by a carrier without notice to the shipper that its delivery will be delayed, and delay occasioned by unusual rush of business or large accumulation of freight is no defense to an action for delaying the shipment. *Texas & N. O. Ry. Co. v. E. R. & D. C. Kolp, Jr.*, (Tex. Civ. App.) 88 S. W. 417.

16. *Silver v. Hale*, 2 Mo. App. 557. Compare *Sumner v. Charlotte, etc.*, R. Co., 78 N. C. 289.

17. *Bennett v. Byram*, 38 Miss. 20, 75 Am. Dec. 90. See also *Vicksburg, etc., R. Co. v. Ragsdale*, 46 Miss. 477.

The words "privilege of reshipping" in a bill of lading, are intended for the carrier's benefit, but do not limit his responsibility, and where

the waters of the Ohio fell so that the boat had to wait at the falls, and a custom was clearly shown of so waiting for a month or more, the words mentioned imposed no obligation to reship, and waiting was justifiable. *Broadwell v. Butler & Co.*, 6 McLean (U. S.), 296.

But under a written contract, by which the owner of a steamboat bound themselves, as common carriers, to deliver certain goods at a specified point, the loss of the goods by fire, after having been deposited in a warehouse at the highest point to which, on account of the low stage of the water, the boat could ascend the river, does not excuse the defendant's failure to deliver the goods at the specified point and the acceptance of a portion by the con-

The freezing of a water-way, such as a canal, is such an act of intervention of the *vis major* as will excuse performance until the obstruction is removed, but a contract to carry goods, made by a canal boatman shortly before the period when the canal might be expected to freeze, requires him to make a special effort to perform the contract, and where, by failure to exercise due diligence, the carrier is able to transport the goods only part of the way, it is liable for the damages occasioned by the delay.¹⁸

§ 14. Strikes by employes.

A carrier is not liable for delay in the shipment and delivery of freight which is caused by a strike of its employes and workmen, accompanied by violence and intimidation by the strikers, with a view of preventing the carrier from employing new agents or preventing those who did not strike and who were ready and willing to work from working, of such a character as cannot be

signee, at a place different from that specified in the contract, though admissible in mitigation of damages, does not discharge the carrier from liability for the residue. *Cox v. Peterson*, 30 Ala, 608, 68 Am. Dec. 145.

Evidence by a carrier that goods lost by burning in a warehouse could not be moved before the fire on account of the water being so low is competent to rebut the presumption of negligence arising from delay in reshipping the goods, where the bill of lading exempted the carrier from liability except ordinary neglect in case of fire. *Hornthall v. Roanoke, etc., Steamboat Co.*, 107 N. C. 76, 11 S. E. 1049.

18. *Spann v. Erie Boatman's Transp. Co.*, 11 Misc. Rep. (N. Y.) 680, 33 N. Y. Supp. 566, and the shipper's measure of damage is the difference between the contract price

of transportation and the increased costs necessary to secure the delivery of the property at its destination, and such further increased expense as was necessarily incurred as a consequence of the delay. *Ogden v. Marshall*, 8 N. Y. 340; *Briggs v. New York, etc., R. Co.*, 28 Barb. (N. Y.) 515; *Farwell v. Davis*, 66 Barb. (N. Y.) 73. See also *Parsons v. Hardy*, 14 Wend. (N. Y.) 215, 28 Am. Dec. 521.

Where a carrier was delayed in the transportation of goods by the freezing of a canal owing to the lateness of the season and without any fault on the part of the carrier, and the goods were stored and the shipper notified, the carrier was entitled to recover the expense of unloading and storing the goods. *Beckwith v. Frisbie*, 32 Vt. 559.

overcome by the company or controlled by the civil authorities when called upon, when such acts are done by persons after they have abandoned the service of the company.¹⁹ But the mere refusal of the carrier's employes to work, thus depriving the carrier, for the time, of the ability to forward the property, where there is no unlawful violence or active interference with the carrier's trains, is no defence to an action for delay in transportation, as the excuse arises wholly out of the misconduct of the carrier's servants who wrongfully refused to perform their duties.²⁰ When the places of the recusant employes have been promptly filled with

19. *Geismer v. Lake Shore, etc.*, R. Co., 102 N. Y. 463, 55 Am. Rep. 837, 7 N. E. 828; *Little v. Fargo*, 43 Hun (N. Y.), 233; *Hall v. Pennsylvania R. Co.*, 1 Fed. 226, 3 Am. & Eng. R. Cas. 274, 14 Phila. (Pa.) 414; *Haas v. Kansas City, etc., R. Co.*, 81 Ga. 792, 35 Am. & Eng. R. Cas. 572, 7 S. E. 629; *Louisville, etc., R. Co. v. Queen City Coal Co. (Ky.)*, 35 S. W. 626; *Louisville, etc., R. Co. v. Bell*, 13 Ky. Law Rep. 393; *Bartlett v. Pittsburgh, etc., R. Co.*, 94 Ind. 281, 18 Am. & Eng. R. Cas. 549; *Hamilton v. Western North Carolina R. Co.*, 96 N. C. 398; *International, etc., R. Co. v. Tisdale*, 74 Tex. 8, 11 S. W. 900, 4 L. R. A. 545; *Gulf, etc., R. Co. v. Levi*, 76 Tex. 337, 42 Am. & Eng. R. Cas. 439, 13 S. W. 191, 18 Am. St. Rep. 45, 8 L. R. A. 323; *Galveston, etc., R. Co. v. Karrer*, Tex. Civ. App., 109 S. W. 440; *Sterling v. St. Louis, etc., R. Co.*, 38 Tex. Civ. App. 451, 86 S. W. 655; *Southern Pac. R. Co. v. Johnson (Tex. App.)*, 15 S. W. 121, 45 Am. & Eng. R. Cas. 338; *Gulf, etc., R. Co. v. Gatewood*, 79 Tex. 89; *Indianapolis, etc., R. Co. v. Juntgen*, 10 Ill. App.

295; *White v. Missouri Pac. R. Co.*, 19 Mo. App. 400; *Budgett v. Binnington*, 1 Q. B. 35. Compare *Missouri Pac. R. Co. v. Levi*, 4 Tex. App. Civ. Cas. § 8.

20. *Blackstock v. New York, etc., R. Co.*, 20 N. Y. 48, 75 Am. Dec. 372; *People v. New York Cent., etc., R. Co.*, 28 Hun (N. Y.), 543, 9 Am. & Eng. R. Cas. 1; *Weed v. Panama R. Co.*, 17 N. Y. 362, 72 Am. Dec. 474; *Missouri, etc., R. Co. v. Woods*, — Tex. Civ. App. —, 117 S. W. 196; *International, etc., R. Co. v. Server*, 3 Tex. App. Civ. Cas. § 440; *Pittsburgh, etc., R. Co. v. Hazen*, 84 Ill. 36, 25 Am. Rep. 432; *Sinsabaugh v. Cleveland, etc., R. Co.*, 149 Ill. App. 430; *Central, etc., R. Co. v. Georgia Fruit, etc., Exch.*, 91 Ga. 389, 55 Am. & Eng. R. Cas. 606; *Read v. St. Louis, etc., R. Co.*, 60 Mo. 199; *Sherman v. Pennsylvania R. Co.*, 21 Fed. Cas. No. 12,769, 8 Wkly. Notes Cas. (Pa.) 269.

The shipper must be notified, in case of a delay due to a strike. *Alabama, etc., R. Co. v. Brichetto*, 72 Miss. 891.

other competent men, and the strikers then by lawless and irresistible violence prevent the new employes from doing duty, the carrier is not responsible for any delay caused solely by such lawless violence.²¹ Where an uncontrollable mob prevents a railroad company from fulfilling its contract to deliver freight, the company is not liable, although had the company not reduced wages, or insisted upon maintaining the reduction, there would have been no mob.²²

§ 15. Delay caused by levy on goods.

A statute providing that, when a carrier summoned as garnishee in an action has goods in its possession shipped by or consigned to defendant, it shall not be liable for its failure to transport the goods until it is discharged, exonerates the carrier garnished in an action against the shipper or consignee from liability for delay caused by the garnishment, but a carrier merely alleging that a third person was in possession of the goods at the time he was garnisheed and omitting to allege any fact showing that the possession of the third person was the possession of the carrier is not within the statute.²³ Where, after a judgment debtor had delivered goods to a carrier for shipment, notice of garnishment was served on the carrier under which the goods were detained about sixteen days, and the goods were exempt, but of this neither the judgment creditor, the officer, nor the carrier had notice, but as soon as the notice was received, the levy was released, and the goods forwarded in a reasonable time, the debtor could not recover of the carrier for unreasonable detention of his goods.²⁴ The ser-

21. *Geismer v. Lake Shore, etc., R. Co.*, 102 N. Y. 563, 55 Am. Rep. 837; *Pittsburgh, etc., R. Co. v. Hollowell*, 65 Ind. 188, 32 Am. Rep. 63; *Lake Shore, etc., R. Co. v. Bennett*, 89 Ind. 457; *Pittsburgh, etc., R. Co. v. Hazen*, 84 Ill. 36, 25 Am. Rep. 422; *International, etc., R. Co. v. Server*, 3 Tex. App. Civ. Cas. § 441.

22. *Lake Shore, etc., R. Co. v. Bennett*, 89 Ind. 454.

23. *A. C. L. Haase & Sons Fish Co. v. Merchants' Despatch Transp. Co.*, 143 Mo. App. 42, 122 S. W. 362.

24. *Hynds v. Wynn*, 71 Iowa, 593, 33 N. W. 73.

vice of a garnishee summons upon the carrier, after the goods have been received, placed in a car for transportation, and a bill of lading issued by the carrier to the shipper, although the car has not been as yet put in the train, does not excuse the carrier from its duties as such, or authorize an unreasonable delay in forwarding the property to its destination without the State.²⁵

§ 16. Limitation of liability for delay.

The general rule is that common carriers may limit their common law liability only by stipulation or contract,²⁶ and that such contract or stipulation can in no event exempt the carrier from liability for loss occasioned by its own negligence.²⁷ The general rules governing contracts limiting the liability of carriers generally, as discussed herein later on, apply to the limitation of liability for delay.²⁸

§ 17. Carrier's duty during delay.

In an emergency where there is a delay in the delivery of goods, the only duty resting upon the carrier, not otherwise in fault, is to use reasonable efforts and due diligence to overcome the obstacles interposed, to protect the goods from injury, and to forward the goods to their destination.²⁹

§ 18. Delay concurring with inevitable accident.

The rule in New York and some other states is that a common

25. *Baldwin v. Great Northern R. Co.*, 81 Minn. 247, 83 N. W. 986, 51 L. R. A. 640, 83 Am. St. Rep. 370.

26. *Mynard v. Syracuse, etc. R. Co.*, 71 N. Y. 180; *Magnin v. Dinsmore*, 56 N. Y. 168; *Cragin v. New York Cent. R. Co.*, 51 N. Y. 61. See also *Limitation of Liability*, chap. 10.

27. *Nicholas v. New York Cent., etc., R. Co.*, 89 N. Y. 370, 9 Am. & Eng. R. Cas. 103; *Leonard v. Chicago, etc., R. Co.*, 54 Mo. App. 293;

Branch v. Wilmington, etc., R. Co., 88 N. C. 573, 18 Am. & Eng. R. Cas. 621; *White v. Great Western R. Co.*, 2 C. B. N. S. 7, 9 E. C. L. 7, 26 L. J. C. P. 158.

28. See *Limitation of Liability*, chap. 10.

29. *Geismer v. Lake Shore, etc., R. Co.*, 102 N. Y. 563, 55 Am. Rep. 837; *Regan v. Grand Trunk R. Co.*, 61 N. H. 579. See also *Carrier's liability as warehouseman*, chap. 9.

carrier, in order to claim exemption from liability for damage done to goods in its hands in the course of transportation, though injured by what is deemed the act of God, must be without fault itself; its act or neglect must not concur and contribute to the injury. If it departs from the line of duty and violates its contract, and while thus in fault, and in consequence of the fault, the goods are injured by the act of God, which would not have otherwise caused the injury, it is not protected. Where a common carrier therefore receives goods for transportation, but unreasonably delays shipping them and meanwhile they are injured by an inevitable accident, the carrier is liable.³⁰ The United States courts, the courts of Massachusetts, Pennsylvania and some other states, maintain the contrary view that the carrier is not liable, since the negligent delay is the remote and not the proximate cause of the injury, and the carrier is responsible only for the proximate and not for the remote consequences of its actions.³¹ But the

30. *Mynard v. Syracuse, etc., R. Co.*, 71 N. Y. 80; *Read v. Spaulding*, 80 N. Y. 630, 86 Am. Dec. 426; *Michaels v. New York Cent. R. Co.*, 30 N. Y. 564, 86 Am. Dec. 415; *Heyl v. Inman Steamship Co.*, 14 Hun (N. Y.), 564; *Bostwick v. Baltimore, etc., R. Co.*, 45 N. Y. 712; *Dunson v. New York Cent. R. Co.*, 3 Lans. (N. Y.) 265; *Merritt v. Earle*, 29 N. Y. 115; *Wing v. New York, etc., R. Co.*, 1 Hilt. (N. Y.) 235; *Condict v. Grand Trunk R. Co.*, 54 N. Y. 500; *Rawson v. Holland*, 59 N. Y. 611, 18 Am. Rep. 394; *Dunham v. Boston, etc., R. Co.*, 70 Me. 164, 30 Am. Rep. 314; *New Brunswick, etc., T. Co. v. Tiers*, 24 N. J. L. 697, 64 Am. Dec. 394; *Forward v. Pittard*, 1 T. R. 27; *Crosby v. Fitch*, 12 Conn. 410, 31 Am. Dec. 745; *Pruitt v. Hannibal, etc., R. Co.*, 62 Mo. 527; *Wolf v. American Express Co.*, 43 Mo. 421, 97 Am. Dec.

406; *Armentrout v. St. Louis, etc., R. Co.*, 1 Mo. App. 158; *Davis v. Wabash, etc., R. Co.*, 89 Mo. 340, 26 Am. & Eng. R. Cas. 315; *Richmond, etc., R. Co. v. Benson*, 86 Ga. 203, 22 Am. St. Rep. 446. See also *Clark v. Pacific R. Co.*, 39 Mo. 184, 90 Am. Dec. 458; *Gilkerson v. Pacific R. Co.*, 39 Mo. 354.

31. *Memphis, etc., R. Co. v. Reeves*, 10 Wall. (U. S.) 176; *Wertheimer v. Pennsylvania R. Co.*, 17 Blatchf. (U. S.) 421; *Denny v. New York Cent. R. Co.*, 13 Gray (Mass.), 481, 74 Am. Dec. 645; *Morrison v. Davis*, 20 Pa. St. 171, 57 Am. Dec. 695; *Hoadley v. Northern Transp. Co.*, 115 Mass. 304, 15 Am. Rep. 106; *Clark v. Needles*, 25 Pa. St. 338; *Haverly v. State Line, etc., R. Co.*, 135 Pa. St. 50, 43 Am. & Eng. R. Cas. 31, 20 Am. St. Rep. 848; *McCarthy v. Louisville, etc., R. Co.*, 102

latter rule is qualified, when it appears that the carrier unnecessarily exposed the property to such accident by any culpable act or omission of its own, or neglected to make provision for those dangers which ordinary skill and foresight is bound to anticipate, and the carrier in such cases is held liable.³² A common carrier receiving property for transportation with knowledge of the existence of an obstruction on its road, and without informing the shipper, cannot offer the obstruction as an excuse for not making a prompt delivery thereof, though the obstruction is the act of God; and it is bound to take notice of the signs of approaching danger liable to create obstructions, if any are known to it.³³

Ala. 193, 48 Am. St. Rep. 29, 61 Am. & Eng. R. Cas. 182; *O'Brien v. McGlinchy*, 68 Me. 557; *Michigan Cent. R. Co. v. Burrows*, 33 Mich. 6; *McClary v. Sioux City, etc.*, R. Co., 3 Neb. 44, 19 Am. Rep. 631; *MacVeagh v. Atchison, etc.*, R. Co., 3 N. M. 205, 18 Am. & Eng. R. Cas. 651; *Daniels v. Ballentine*, 23 Ohio St. 532, 13 Am. Rep. 264; *Lamont v. Nashville, etc.*, R. Co., 9 Heisk. (Tenn) 58; *White v. Conly*, 14 Lea (Tenn.), 51, 52 Am. Rep. 154; *Davis v. Central Vermont*

R. Co., 66 Vt. 290, 44 Am. St. Rep. 852, 61 Am. & Eng. R. Cas. 201; *Beckwith v. Frisbie*, 32 Vt. 559.

32. *McGraw v. Baltimore, etc.*, R. Co., 18 W. Va. 361, 41 Am. Rep. 696, 9 Am. & Eng. R. Cas. 188, citing *Williams v. Grant*, 1 Conn. 487, 7 Am. Dec. 235; *Morrison v. Davis*, 20 Pa. St. 171, 57 Am. Dec. 695; *Hewett v. Chicago, etc.*, R. Co., 63 Iowa, 611, 18 Am. & Eng. R. Cas. 558.

33. *Nelson v. Great Northern Ry. Co.*, 28 Mont. 297, 72 Pac. 642.

CHAPTER IX.

LIABILITY AS WAREHOUSEMAN.

- SECTION**
1. Carrier's liability as warehouseman before transportation.
 2. Carrier's liability as warehouseman during transportation.
 3. Carrier's liability as warehouseman as to goods awaiting delivery.—Massachusetts rule.
 4. The New Hampshire rule.—English rule.—Origin of different rules.
 5. Change in nature of liability of carrier in general.
 6. Conflict of laws.
 7. What is reasonable time for removal of goods generally.
 8. Time extended by failure or refusal to deliver.
 9. Notice to consignee held not essential.
 10. Necessity of notice maintained.
 11. Sufficiency of notice.
 12. Notice to consignor.
 13. Liability of connecting carriers.
 14. The burden of proof.
 15. Effect of special contract or usage on rule.
 16. Duty of carrier as warehouseman to store safely.
 17. Carrier's liability as warehouseman for negligence.
 18. Statute making railroad company liable for losses by fire.
 19. Proximate cause of loss.

§ 1. Carrier's liability as warehouseman before transportation.

Whether the carrier's relation is that of a common carrier or a warehouseman must often be determined in order to determine the extent of its liability, its liability in the first relation being that of an insurer, and in the second relation it being liable for ordinary negligence only and held only to ordinary diligence, as we have already seen.¹ The principle is well settled that a carrier is responsible, as such, only when goods are delivered to and accepted by it for immediate transportation in the usual course of business. If delivered awaiting further orders from the shipper

1. See §§ 2 and 34, chap. 2.

before shipment, it is, while they are so in its custody, responsible only as warehouseman.² The test whether the carrier's relation is that of a common carrier, or a warehouseman, is generally stated to be whether the goods have been delivered by the shipper for the purpose of immediate transportation, without further orders, or not.³ If the goods are not delivered for immediate transportation in the usual course of business, but the shipment is delayed at the instance of the owner, or the goods are retained at the shipper's request, or the carrier is instructed to await further orders before shipping, or the goods are to be stored for a specified time, or until the happening of a certain event, the carrier's relation and liability is that of a warehouseman only until after the shipper has given directions for immediate shipment, or the time for immediate shipment has arrived.⁴ If something remains to be done by the

2. *Moses v. Boston, etc., R. Co.*, 24 N. H. (4 Fost.) 71, 55 Am. Dec. 222; *O'Neill v. New York Cent., etc., R. Co.*, 60 N. Y. 138, 10 Am. Ry. Rep. 121; *Rogers v. Wheeler*, 52 N. Y. 262. See also § 34, chap. 2, and § 1, chap. 4.

Goods stopped in transitu and held subject to shipper's order the carrier is liable for as warehouseman. *McVeagh v. Atchison, etc., R. Co.*, 3 N. M. (Gild.) 205, 5 Pac. 457.

Liable as carrier where storage is mere accessory to carriage.—Where a carrier receives freight for transportation, though it has no trains scheduled to carry it until the following day, and the shipper knows the facts and understands that the goods will be stored in the depot until the following day, the carrier, while holding the goods at the depot, is liable as a carrier, and not as a warehouseman. *Southern Ry. Co. in Kentucky v. Smith*, 31 Ky. Law Rep. 243, 102 S. W. 232. See also § 1, chap. 4.

3. *Ark.*—*Little Rock, etc., R. Co. v. Hunter*, 42 Ark. 200, 18 Am. & Eng. R. Cas. 527.

Mass.—*Judson v. Western R. Corp.*, 86 Mass. (4 Allen) 520, 81 Am. Dec. 718; *Fitchburg, etc., R. Co. v. Hanna*, 72 Mass. (6 Gray) 539, 66 Am. Dec. 427.

Mo.—*Goodbar v. Wabash R. Co.*, 53 Mo. App. 434, passenger's baggage. *N. Y.*—*Coyle v. Western R. Corp.*, 47 Barb. (N. Y.) 152; *Wade v. Wheeler*, 2 Lans. (N. Y.) 201.

Ohio.—*Pittsburgh, etc., R. Co. v. Barrett*, 36 Ohio St. 448, 3 Am. & Eng. R. Cas. 256.

Pa.—*Clarke v. Needles*, 25 Pa. St. (1 Casey) 338.

Wis.—*White v. Goodrich Transp. Co.*, 46 Wis. 493, 1 N. W. 75, 21 Am. Ry. Rep. 398.

4. *Ark.*—*St. Louis, etc., R. Co. v. Citizens Bank of Little Rock*, 87 Ark. 26, 112 S. W. 154; *Little Rock, etc., R. Co. v. Hunter*, *supra*.

shipper after the goods have been delivered for shipment before they are ready for transportation, as where they are delivered to the carrier without instructions as to their destination, or to await orders, or until charges for transportation are paid, the relation and liability of the carrier is that of warehouseman merely.⁵ But

Ill.—*St. Louis, etc., R. Co. v. Montgomery*, 39 Ill. 336.

Mass.—*Nichols v. Smith*, 115 Mass. 332; *Dickinson v. Winchester*, 58 Mass. (4 Oush.) 114, 50 Am. Dec. 760.

Mich.—*Michigan Southern, etc., R. Co. v. Shurtz*, 7 Mich. 515; *Detroit & M. R. Co. v. Adams*, 15 Mich. 458.

Miss.—*Illinois Cent. R. Co. v. Troustine*, 64 Miss. 834, 2 So. 255, passenger's baggage.

N. Y.—*O'Neill v. New York Cent. etc., R. Co.*, *supra*; *Platt v. Hibbard*, 7 Cow. (N. Y.) 499.

N. C.—*Ford v. Atlantic, etc., R. Co.*, 53 N. C. (8 Jones, L.) 235, 78 Am. Dec. 277; *Basnight v. Atlantic, etc., R. Co.*, 111 N. C. 592, 16 S. E. 323.

Ohio.—*Fisher v. Lake Shore & M. S. R. Co.*, 17 Ohio Cir. Ct. 491, 9 O. C. D. 413; *Pittsburgh, etc., R. Co. v. Barrett*, *supra*.

Wis.—*Schmidt v. Chicago, etc., R. Co.*, 90 Wis. 504, 63 N. W. 1057.

U. S.—*Louisville & N. R. Co. v. United States*, 39 Ct. Cl. (U. S.) 405.

Can.—*Milloy v. Grand Trunk R. Co.*, 23 Ont. Rep. 454, 55 Am. & Eng. R. Cas. 579.

5. *Ala.*—*St. Louis & S. F. R. Co. v. Cavender*, 170 Ala. 601, 54 So. 54; *Alabama G. S. R. Co. v. Mt. Vernon Co.*, 84 Ala. 173, 4 So. 356.

Dak.—*Mulligan v. Northern Pac.*

R. Co., 4 Dak. 315, 29 N. W. 359, 27 Am. & Eng. R. Cas. 33.

* *Ill.*—*Illinois Cent. R. Co. v. Hornberger*, 77 Ill. 457; *Illinois Cent. R. Co. v. Ashmead*, 58 Ill. 487; *Illinois Cent. R. Co. v. McClellan*, 54 Ill. 58, 5 Am. Rep. 83. In these cases goods had been deposited upon the platform or in the warehouse or car of the carrier for future shipment.

Mass.—*Watts v. Boston, etc., R. Corp.*, 106 Mass. 466; *Barron v. Eldridge*, 100 Mass. 455, 1 Am. Rep. 126.

Mich.—*Stapleton v. Grand Trunk Ry. Co.*, 133 Mich. 187, 10 Detroit Leg. N. 133, 94 N. W. 739.

N. C.—*Basnight v. Atlantic, etc., R. Co.*, *supra*.

U. S.—*St. Louis, etc., R. Co. v. Knight*, 122 U. S. 79, 7 Sup. Ct. 1132, 30 L. Ed. 1077.

A charter provision as to "goods on deposit awaiting delivery" that the carrier shall not be responsible for them, does not include goods awaiting transportation, but only those which have reached their destination. *Michigan Cent. R. Co. v. Mineral Springs Mfg. Co.*, 83 U. S. (16 Wall.) 318, 21 L. Ed. 297.

Where goods are delivered to a carrier to be shipped, but not to be shipped till other goods are delivered the next morning, to be shipped with them, its liability in the meantime is that of a warehouseman only.

when the goods are detained or delayed awaiting shipment, through the carrier's act or to suit its purpose or convenience, as, for example, where the carrier has not then the means of transportation ready, and not on account of or by the request or act of the owner or shipper, the relation and liability is that of a common carrier, and not of a warehouseman.⁶ Where nothing further is required to prepare the goods for transportation, and no further orders are necessary to enable the carrier to forward them, the carrier's liability therefor, as soon as the goods are delivered at the freight house or depot of the carrier, is that of a common carrier, and not of a warehouseman.⁷ A delivery of goods to a carrier must be for immediate transportation, and, if they are delivered to be stored for a specified time, or until the happening of a certain event, or until further orders, the carrier is a mere depositary, or bailee, and its liability is measured by the principles governing that relation, and not by those relating to carriers.⁸ A common carrier is responsible as such only when freight is delivered to and accepted by it for immediate transportation in the usual course of business, so that where a common carrier receives goods, and something remains to be done before they can be transported, as where they are delivered to the carrier without instructions as to their destination, or to await orders or until charges for transportation are paid, the responsibility of a carrier is not that of an insurer,

Missouri Pac. R. Co. v. Riggs, 10 Kan. App. 578, 62 Pac. 712.

6. *La.*—Meyer v. Vicksburg, etc., R. Co., 41 La. Ann. 639, 6 So. 218.

Mo.—Gregory v. Wabash R. Co., 46 Mo. App. 574.

N. H.—Barter v. Wheeler, 49 N. H. 9, 6 Am. Rep. 434.

Tex.—Gulf, etc., R. Co. v. Trawick, 80 Tex. 270, 15 S. W. 568, where cattle have been placed in the carrier's pen for immediate shipment, and part of them have actually been placed on the cars, the cattle are in the cus-

tody of the defendant as carrier, and not as warehouseman. Texas & P. R. Co. v. Morse, 1 White & W. Civ. Cas. Ct. App. (Tex.) § 411.

7. London & L. Fire Ins. Co. v. Rome, etc., R. Co., 68 Hun (N. Y.) 598, 23 N. Y. Supp. 231, aff'd in 144 N. Y. 200, 39 N. E. 79; Blossom v. Griffin, 13 N. Y. (3 Kern.) 569, 67 Am. Dec. 75; Southern Express Co. v. McVeigh, 20 Grat. (Va.) 264.

8. St. Louis, etc., Ry. Co. v. Citizens' Bank of Little Rock, 87 Ark. 26, 112 S. W. 154.

but that of a warehouseman, who is held only to ordinary care for their safety.⁹ Where a railroad company allowed shippers of cotton to leave cotton on its station platform until the full lot to be shipped was ready, it was liable, as a warehouseman, under Texas Rev. St. 1895, art. 323, providing that a railroad company shall be liable as a warehouseman for goods stored before the commencement of transportation, for part of a lot of cotton intended for shipment, left overnight on the platform by the shipper, in accordance with custom, awaiting the rest of the shipment, to be brought the next day.¹⁰ Where a railroad finds goods in one of its cars without bill of lading or other instructions, and removes them to a storehouse, requesting and awaiting instructions which are not furnished, the liabilities are those of a warehouseman and not of a common carrier.¹¹ Where a carter conveys goods designed for shipment to the freight depot of a railroad company, and deposits them on the platform of such depot, where such goods are customarily delivered to and received by such company for shipment, and notifies the proper shipping agent of such company of the presence of such goods on the platform, and that they are to be shipped to a certain station on such railroad after one of the articles has been properly crated, and that a person will come and crate such article during the day, and the agent of the company expresses his assent to what is said and proposed, this amounts to the delivery of such goods to the railroad company and its acceptance of the custody thereof as warehouseman.¹²

§ 2. Carrier's liability as warehouseman during transportation.

While goods are in course of transportation carriers can only be relieved of their liability as common carriers by a delivery

9. *St. Louis & S. F. R. Co. v. Caver*, 170 Ala. 601, 54 So. 54.

10. *Chicago, etc., Ry. Co. v. S. Marshall Bulley & Son*, (Tex. Civ. App.) 140 S. W. 480.

11. *Louisville & N. R. Co. v. United States*, 39 Ct. Cl. (U. S.) 405.

A railroad is not liable as a common carrier for property deposited in its warehouse awaiting the orders of the owner for transportation. *Id.*

12. *Fisher v. Lake Shore, etc., R. Co.*, 17 Ohio Cir. Ct. R. 491, 9 O. C. D. 413.

of the goods to the next carrier in the line of transportation, or by a notice to it that the goods are ready for delivery, and the lapse of a reasonable time for the latter to take them away, and in the event of its neglect so to do, the proper storage of the same, or by the doing of some act indicating a renunciation of the relation of carrier. In the event of a delay in the delivery to the succeeding carrier, for which the initial carrier is not responsible, it is its duty to notify the shipper immediately and await further instructions.¹³

§ 3. Carrier's liability as warehouseman as to goods awaiting delivery.—Massachusetts rule.

The doctrine of the courts is conflicting as to when the relation and liability of a common carrier ceases and that of a warehouseman only attaches, where goods have been transported to their destination and are in the vehicles or warehouses of the carrier awaiting delivery to the consignee. In Massachusetts and some other States what is known as the Massachusetts rule is adopted, which holds that the carrier by railroad can only be required to carry the goods safely to the station and place them on the platform or in a warehouse; that when it has transported them safely to the place of delivery, and, the consignee not being present to receive them, has unloaded them and put them in a safe and proper place for the consignee to take them away, if the goods are of the kind that are usually unloaded and put in the freight house or warehouse by the carrier, or has them in its cars ready to be un-

13. *Mills v. Michigan Cent. R. Co.*, 45 N. Y. 622, 6 Am. Rep. 152; *McDonald v. Western Transp. Co.*, 34 N. Y. 497; *Goold v. Chapin*, 20 N. Y. 259, 75 Am. Dec. 398; *Illinois Cent. R. Co. v. Mitchell*, 68 Ill. 471, 18 Am. Rep. 564; *Merchants' Despatch, etc., Co. v. Moore*, 88 Ill. 136, 21 Am. Ry. Rep. 293; *Mason v. Grand Trunk R. Co.*, 37 U. C. Q. B. 163. See also

Connecting carriers, chap. 20; *Liability for delay*, chap. 8.

Where a railroad company receives loaded cars from another road for transportation, it is liable as a common carrier in case they are destroyed en route by fire. *Missouri Pac. R. Co. v. Chicago, etc., R. Co.*, 25 Fed. 317, 23 Am. & Eng. R. Cas. 718.

loaded, if of the kind that the consignee usually takes from the cars, the liability of the carrier as an insurer is ended, and it becomes liable, by force of law, as a depositary or custodian of the property, or warehouseman, bound to reasonable diligence in the custody of them and liable only for a want of ordinary care. The carrier is not bound to give notice to the consignee of the arrival of the goods, but it is the duty of the latter to call for and take away the goods without notice from the carrier. The carrier is entitled to assume the liability of warehouseman, upon the completion of the transportation and the safe storage of the goods, during such reasonable time as they remain in its custody awaiting the call of the consignee.¹⁴ The existence of a custom or established

14. *Mass.*—*Nealand v. Boston, etc., R. Co.*, 161 *Mass.* 67, 36 *N. E.* 592, the liability of a carrier with respect to the personal baggage of a passenger after it has reached its destination is that of a bailee for hire; *Blaisdell v. Connecticut River R. Co.*, 145 *Mass.* 132, 13 *N. E.* 373; *Bassett v. Connecticut River R. Co.*, 145 *Mass.* 129, 1 *Am. St. Rep.* 443, 13 *N. E.* 370, 32 *Am. & Eng. R. Cas.* 528; *Rice v. Hart*, 118 *Mass.* 201, 19 *Am. Rep.* 433; *Stowe v. New York, etc., R. Co.*, 113 *Mass.* 521; *Lane v. Boston, etc., R. Co.*, 112 *Mass.* 455; *Barron v. Eldridge*, 100 *Mass.* 455, 1 *Am. Rep.* 126; *Rice v. Boston, etc., R. Corp.*, 98 *Mass.* 212; *Norway Plains Co. v. Boston, etc., R. Co.* 1 *Gray (Mass.)* 272, 61 *Am. Dec.* 423; *Thomas v. Boston, etc., R. Corp.*, 10 *Metc. (Mass.)* 477, 43 *Am. Dec.* 444.

Ga.—*Kight v. Wrightsville & T. R. Co.*, 127 *Ga.* 204, 56 *S. E.* 363, under *Civ. Code* 1895, § 2279; *Georgia, etc., R. Co. v. Pound*, 111 *Ga.* 6, 36 *S. E.* 312; *Almand v. Georgia R. etc., Co.*, 95 *Ga.* 775;

Georgia R. etc., Co. v. Thompson, 86 *Ga.* 327, 45 *Am. & Eng. R. Cas.* 422; *Western, etc., R. Co. v. Camp*, 53 *Ga.* 596; *Southwestern R. Co. v. Felder*, 46 *Ga.* 433, 11 *Am. Ry. Rep.* 419; *Rome R. Co. v. Sullivan*, 14 *Ga.* 277; *Central R. etc., Co. v. Anderson*, 58 *Ga.* 393, 16 *Am. Ry. Rep.* 85; *Georgia Code*, § 2070, where the goods arrive out of time, notice must be given to the consignee and a reasonable time allowed him to call for and remove them.

Ill.—*Chicago, etc., R. Co. v. Kendall*, 72 *Ill. App.* 105; *Gregg v. Illinois Cent. R. Co.*, 147 *Ill.* 550, 37 *Am. St. Rep.* 238; *Porter v. Chicago, etc., R. Co.*, 20 *Ill.* 407, 71 *Am. Dec.* 286; *Illinois Cent. R. Co. v. Friend*, 64 *Ill.* 303; *Chicago, etc., R. Co. v. Scott*, 42 *Ill.* 132; *Vincent v. Chicago, etc., R. Co.*, 49 *Ill.* 33; *Illinois Cent. R. Co. v. Alexander*, 20 *Ill.* 23; *Davis v. Michigan Southern, etc., R. Co.*, 20 *Ill.* 412; *Richards v. Michigan Southern, etc., R. Co.*, 20 *Ill.* 404; *Merchants' Despatch Transp. Co. v. Hallock*, 64 *Ill.* 284; *Rothschild v. Michi-*

usage may be shown to vary the general rule in some States.¹⁵

gan Cent. R. Co., 71 Ill. 96; Merchants' Despatch, etc., R. Co., v. Moore, 88 Ill. 138, 30 Am. Rep. 541; Chicago, etc., R. Co. v. Jenkins, 103 Ill. 599; Chicago, etc., R. Co. v. Bensley, 69 Ill. 630, but the liability of a common carrier ceases only after the unloading of the goods.

Ind.—Pittsburgh, etc., R. Co. v. Nash, 43 Ind. 423; Cincinnati, etc., R. Co. v. McCool, 26 Ind. 140; Bannemer v. Toledo, etc., R. Co., 25 Ind. 434, 87 Am. Dec. 367.

Iowa.—Mohr v. Chicago, etc., R. Co., 40 Iowa, 579; Francis v. Dubuque, etc., R. Co., 25 Iowa, 60, 95 Am. Dec. 769.

The duty of a railroad company, as a carrier of wheat in bulk, does not cease until the cars have been so placed that they can be unloaded with a reasonable degree of convenience. It is not enough to put the cars where, possibly, they could be unloaded. Independence Mills Co. v. Burlington, etc., R. Co., 72 Iowa, 535, 2 Am. St. Rep. 258, 32 Am. & Eng. R. Cas. 456.

When a carrier ceases to be a carrier and becomes a warehouseman, it cannot be protected as a carrier by the constitutional provisions as to regulations of commerce. State v. Creeden, 78 Iowa, 556, 43 N. Y. 673, 40 Am. & Eng. R. Cas. 31, 7 L. R. A. 295.

Mo.—Pindell v. St. Louis, etc., R. Co., 41 Mo. App. 84; Hartman v. Louisville, etc., R. Co., 39 Mo. App. 68; Buddy v. Wabash, etc., R. Co., 20 Mo. App. 206; Kansas City Transfer Co. v. Neiswanger, 18 Mo. App. 103;

Bergner v. Chicago, etc., R. Co., 13 Mo. App. 499; Eaton v. St. Louis etc., R. Co., 12 Mo. App. 386; Gashweiler v. Wabash, etc., R. Co., 83 Mo. 112, 25 Am. & Eng. R. Cas. 403, 53 Am. Rep. 558; E. O. Stannard Milling Co. v. White Line Cent. Transit Co., 122 Mo. 258, 61 Am. & Eng. R. Cas. 185; Rankin v. Pacific R. Co., 55 Mo. 167; Cramer v. American Merchants' U. Exp. Co., 56 Mo. 524; Holtzclaw v. Duff, 27 Mo. 395.

N. C.—Turrentine v. Wilmington, etc., R. Co., 100 N. C. 375, 6 Am. St. Rep. 602; Neal v. Wilmington, etc., R. Co., 8 Jones L. (N. C.) 482; Hilliard v. Wilmington, etc., R. Co., 6 Jones L. (N. C.) 343.

Pa.—Allam v. Pennsylvania R. Co., 3 Pa. Super. Ct. 335, 183 Pa. 104, 41 W. N. C. 205, 83 Atl. 709, 39 L. R. A. 535; National Line Steamship Co. v. Smart, 107 Pa. St. 492; Shenk v. Philadelphia Steam Propeller Co., 60 Pa. St. 109, 100 Am. Dec. 541; McCarty v. New York, etc., R. Co., 30 Pa. St. 247; Union Express Co. v. Ohleman, 92 Pa. St. 323, but express companies are bound to make actual delivery. And the carrier is bound to give notice when he specially contracts to do so. Tanner v. Oil Creek R. Co., 53 Pa. St. 411. See also Eagle v. White, 6 Whart. (Pa.) 505, 37 Am. Dec. 434.

Tenn.—East Tennessee, etc., R. Co. v. Kelly, 91 Tenn. 699, 55 Am. & Eng. R. Cas. 621; Butler v. East Tennessee, etc., R. Co., 8 Lea (Tenn.) 32, 9 Am. & Eng. R. Cas. 249; Southern Express Co. v. Kaufman, 12 Heisk. (Tenn.) 165; Dean v. Vaccaro, 2

After goods have been delivered by a common carrier at its depot, the owner or consignee has a reasonable time within which to remove them, during which the liability of the carrier as an insurer continues. But, after the expiration of such reasonable time, the liability of the carrier becomes modified, and it is only bound to exercise ordinary care to secure the safety of the goods. The liability is that of a bailee for hire and grows out of the original contract.¹⁶ Transportation ceases when the duty of the carrier as a warehouseman commences, and as to freight transported in car load lots when the car reaches the destination and is placed for unloading.¹⁷ Where a common carrier places freight cars on its team tracks and notifies the consignees of their arrival, and then holds them for inspection and sale by the consignees while awaiting the further orders of the consignor, the obligations of the common carrier have been reduced to and become those of a warehouseman.¹⁸ Where, after a carrier has transported goods to the place of delivery, the consignee pays the freight, receipts for them, and contracts for reshipment with another carrier, and leaves them in the warehouse of the first carrier to await reshipment, the liabilities of the first carrier are changed to those of warehouseman.¹⁹ Where a carrier's rule for the delivery of goods at a station re-

Head (Tenn.) 488, 75 Am. Dec. 744; *Lancaster Mills v. Merchants' Cotton Press Co.*, 89 Tenn. 1, 24 Am. St. Rep. 586, 45 Am. & Eng. R. Cas. 423.

Va.—*Norfolk & W. Ry. Co. v. Stuart's Draft Milling Co.*, 109 Va. 184, 63 S. E. 415.

A railroad company keeping the property of its patrons in its own warehouse for a reasonable time until it shall be called for, is, in the absence of statute, to be regarded as a bailee for hire, and not a naked depositary. *Hardman v. Montana U. R. Co.*, 48 U. S. App. 570, 39 L. R. A. 300, 83 Fed. Rep. 88, 27 C. C. A.

407; *Norway Plains Co. v. Boston, etc., R. Co.*, 1 Gray (Mass.) 273, 41 Am. Dec. 423.

15. *Georgia, etc., R. Co. v. Pound*, 111 Ga. 6, 36 S. E. 312.

16. *Moyer v. Pennsylvania R. Co.*, 31 Pa. Super. Ct. 559.

17. *Brooks Mfg. Co. v. Southern Ry. Co.*, 152 N. C. 665, 68 S. E. 243.

18. *St. Louis Hay & Grain Co. v. Chicago & A. R. Co.*, 151 Ill. App. 384.

19. *Eli Hurley & Son v. Norfolk & W. Ry. Co.*, 68 W. Va. 471, 69 S. E. 904.

quired notice to the consignee, the carrier's relation to the goods did not change to that of a warehouseman prior to the giving of such notice.²⁰ Where a consignee directs a carrier to hold goods at destination pending negotiations with the consignor who acquiesces in its holding, if the goods are lost, the liability is that of a warehouseman.²¹ After tender of delivery of merchandise by a carrier to the consignee, the carrier is at liberty to store such merchandise, and thereafter its liability ceases, and it is only bound to the exercise of ordinary care and diligence in the preservation of the property.²²

§ 4. The New Hampshire rule.—English rule.—Origin of different rules.

In New Hampshire, New York and most of the other States what is known as the New Hampshire rule is followed, which holds that the carrier's liability as insurer in the case of railroads continues after the arrival of the goods at their destination and their removal into the warehouse, until the owner or consignee has had a reasonable time in which to call or send for them, inspect them, and take them away or reject them. The carrier's duty has not been completely performed until he has delivered the goods, or offered to deliver them to the consignee, or has done what is equivalent to delivery by giving to the consignee, if he can be found, due notice after their arrival, and by furnishing him a reasonable time thereafter to take charge of and remove the same. If the consignee does not then call for them, liability as a common carrier ceases.²³ The rule laid down by the English

20. *P. Garvan, Inc., v. New York Cent., etc., R. Co.*, 210 Mass. 275, 96 N. E. 717.

21. *Seaboard Air Line Ry. Co. v. A. R. Harper Piano Co.*, 63 Fla. 264, 58 So. 491.

22. *Bryan v. Chicago & A. R. Co.*, 169 Ill. App. 181.

23. *N. H.—Welch v. Concord R.*

Co., 68 N. H. 206, 44 Atl. 304; *Moses v. Boston, etc., R. Co.*, 32 N. H. 523, 64 Am. Dec. 388; *Jewell v. Grand Trunk R. Co.*, 55 N. H. 84; *Smith v. Nashua, etc., R. Co.*, 27 N. H. 86, 59 Am. Dec. 364.

N. Y.—King v. New Brunswick, etc., Steamboat Co., 36 Misc. Rep. (N. Y.) 555, 73 N. Y. Supp. 999;

authorities is substantially the same as the New Hampshire rule. The consignee of goods shipped is entitled to a reasonable time

Tarbell v. Royal Exchange Shipping Co., 110 N. Y. 170, 17 N. E. 721, 6 Am. St. Rep. 350; *Faulkner v. Hart*, 82 N. Y. 413, 37 Am. Rep. 574; *Sherman v. Hudson River R. Co.*, 64 N. Y. 254; *Nicholas v. New York Cent., etc., R. Co.*, 89 N. Y. 370, 9 Am. & Eng. R. Cas. 103; *Draper v. Delaware, etc., Canal Co.*, 118 N. Y. 118, 42 Am. & Eng. R. Cas. 410; *Pelton v. Rensselaer, etc., R. Co.*, 54 N. Y. 214, 13 Am. Rep. 568; *Sprague v. New York Cent. R. Co.*, 52 N. Y. 637; *Mills v. Michigan Cent. R. Co.*, 45 N. Y. 622, 6 Am. Rep. 152; *Zinn v. New Jersey Steamboat Co.*, 49 N. Y. 442, 10 Am. Rep. 402; *Hedges v. Hudson River R. Co.*, 49 N. Y. 223; *McAndrew v. Whitlock*, 52 N. Y. 40, 11 Am. Rep. 657; *Rawson v. Holland*, 59 N. Y. 611, 17 Am. Rep. 394; *McKinney v. Jewett*, 90 N. Y. 267, 9 Am. & Eng. R. Cas. 209; *Soloman v. Philadelphia, etc., Steamboat Co.*, 2 Daly (N. Y.) 104; *Price v. Powell*, 3 N. Y. 322; *Fenner v. Buffalo, etc., R. Co.*, 44 N. Y. 505, 4 Am. Rep. 709; *Byrne v. Fargo*, 36 Misc. Rep. (N. Y.) 543, 73 N. Y. Supp. 943.

The question of reasonable time becomes immaterial where loss or injury results from a want of ordinary care on the part of the carrier. *Lamb v. Camden, etc., R. Co.*, 2 Daly (N. Y.), 454.

Ala.—*Central of Ga. Ry. Co. v. A. F. Merrill & Co.*, 153 Ala. 277, 45 So. 628; *Barclay v. Southern Ry. Co.*, — Ala. App. —, 60 So. 479; *Hearn v. Louisville & N. R. Co.*, — Ala. App. —, 60 So. 600, under Code 1907, §

5604 and § 5613, carrier holds goods as warehouseman after 48 hours' notice; *Southern Express Co. v. Holland*, 109 Ala. 362, 19 So. 66; *Collins v. Alabama, etc., R. Co.*, 104 Ala. 390; *Columbus, etc., R. Co. v. Ludden*, 89 Ala. 612, 42 Am. & Eng. R. Cas. 404; *Anniston, etc., R. Co. v. Ledbetter*, 92 Ala. 326; *South, etc., Alabama R. Co. v. Wood*, 66 Ala. 167, 9 Am. & Eng. R. Cas. 419, 41 Am. Rep. 749; *Louisville, etc., R. Co. v. McGuire*, 79 Ala. 395; *Kennedy v. Mobile, etc., R. Co.*, 74 Ala. 430, 21 Am. & Eng. R. Cas. 145; *Mobile, etc., R. Co. v. Prewitt*, 46 Ala. 63, 7 Am. Rep. 586; *Alabama, etc., R. Co. v. Kidd*, 35 Ala. 209; *Western R. Co. v. Little*, 86 Ala. 159, 37 Am. & Eng. R. Cas. 659; *Alabama, etc., R. Co. v. Grabfelder*, 83 Ala. 200.

Ark.—*St. Louis, etc., R. Co. v. Dodd*, 59 Ark. 317; *Missouri Pac. R. Co. v. Nevill*, 60 Ark. 375, 28 L. R. A. 80.

Cal.—*Cavallaro v. Texas, etc., R. Co.*, 110 Cal. 348; *Wilson v. California Cent. R. Co.*, 94 Cal. 166, 17 L. R. A. 685. Notice must be given to the consignee under § 2120 of the Civil Code. See also, *Hirshfield v. Central Pac. R. Co.*, 56 Cal. 484, 7 Am. & Eng. R. Cas. 398; *Jackson v. Sacramento Valley R. Co.*, 23 Cal. 270. See also, *Reeder v. Wells, Fargo & Co.*, 14 Cal. App. 790, 113 Pac. 342, holding that section 2120 required that the consignee be given actual notice of the arrival of the freight in order to change the carrier's liability to that of warehouseman, so that

within which to take away the goods, and that reasonable time

where the notice to the consignee of the arrival of freight was dated June 25th, but was mailed in the post office on the morning of June 26th, and the freight was destroyed on the night of June 25th, the carrier's liability was that of carrier, and not of a warehouseman.

Conn.—Graves v. Hartford, etc., Steamboat Co., 38 Conn. 143, 9 Am. Rep. 369.

Del.—McHenry v. Philadelphia, etc., R. Co., 4 Harr. (Del.) 448.

Kan.—Kansas City, etc., R. Co. v. Patten, 3 Kan. App. 338; Missouri Pac. R. Co. v. Wichita, etc., Grocery Co., 55 Kan. 525; Leavenworth, etc., R. Co. v. Maris, 16 Kan. 333.

Ky.—Louisville & N. R. Co. v. Stiles, Gaddie & Stiles, 133 Ky. 786, 119 S. W. 786; Wald v. Louisville, etc., R. Co., 92 Ky. 645; Jeffersonville, etc., R. Co. v. Cleveland, 2 Bush. (Ky.) 473.

La.—Gibbons v. Yazoo & M. V. R. Co., 130 La. 671, 58 So. 505; Maignan v. New Orleans, etc., R. Co., 24 La. Ann. 333.

Md.—United Fruit Co. v. New York & B. Transp. Co., 104 Md. 567, 65 Atl. 415; Baltimore, etc., R. Co. v. Green, 25 Md. 72.

Mich.—Black v. Ashley, 80 Mich. 90, 42 Am. & Eng. R. Cas. 428; Feige v. Michigan Cent. R. Co., 62 Mich. 1; Buckley v. Great Western R. Co., 18 Mich. 121; McMillen v. Michigan Southern, etc., R. Co., 16 Mich. 79, 93 Am. Dec. 208; Hasse v. American Express Co., 94 Mich. 133, 34 Am. St. Rep. 328, 55 Am. & Eng. R. Cas. 635.

Minn.—Kirk v. Chicago, etc., R. Co., 59 Minn. 161, 61 Am. & Eng. R.

Cas. 203; Arthur v. St. Paul, etc., R. Co., 38 Minn. 95; Derosia v. Winona, etc., R. Co., 18 Minn. 133; Pinney v. First Div. St. Paul, etc., R. Co., 19 Minn. 251, 20 Am. Ry. Rep. 71; Armstrong v. Chicago, etc., R. Co., 45 Minn. 85, 45 Am. & Eng. R. Cas. 422.

Neb.—Burlington, etc., R. Co. v. Arms, 15 Neb. 69.

N. J.—Morris, etc., R. Co. v. Ayres, 29 N. J. L. 393, 80 Am. Dec. 215.

N. C.—Poythress v. Durham & S. Ry. Co., 148 N. C. 391, 62 S. E. 515, 18 L. R. A. (N. S.) 427.

Ohio.—Lake Erie, etc., R. Co. v. Hatch, 6 Ohio Cir. Ct. Rep. 230, 52 Ohio St. 408, 61 Am. & Eng. R. Cas. 293, note; Hirsch v. Steamboat Quaker City, 2 Disney (Ohio), 144.

S. C.—Knight v. Southern R. Co., 85 S. C. 78, 67 S. E. 16; Brunson & Boatwright v. Atlantic Coast Line R. Co., 76 S. C. 9, 56 S. E. 538; Hipp v. Southern R. Co., 50 S. C. 129, 27 S. E. 623; Spears v. Spartanburg, etc., R. Co., 11 S. C. 158.

Tex.—Missouri Pac. R. Co. v. Haynes, 72 Tex. 175; Houston, etc., R. Co. v. Adams, 49 Tex. 748, 30 Am. Rep. 116; San Antonio & A. P. Ry. Co. v. Winn (Tex. Civ. App.), 132 S. W. 972, under Sayles' Ann. Civ. St. 1897, art. 324; R. W. Williamson & Co. v. Texas & P. Ry. Co. (Tex. Civ. App.), 138 S. W. 807.

Vt.—Winslow v. Vermont, etc., R. Co., 42 Vt. 700, 1 Am. Rep. 365; Blumenthal v. Brainard, 38 Vt. 402, 91 Am. Dec. 350; Ouimit v. Henshaw, 35 Vt. 605, 84 Am. Dec. 646.

Wis.—Backhaus v. Chicago, etc., R. Co., 92 Wis. 393; Lemke v. Chicago, etc., R. Co., 39 Wis. 449, 13 Am. Ry.

begins from notice or knowledge. When such time has elapsed the carrier becomes liable as warehouseman merely.²⁴ The conflict of opinion as to the proper rule to be applied in such cases arose from the common law rule requiring actual delivery by the carrier to the consignee. The impracticability of actual delivery by railroads, from their peculiar character and the magnitude of their business, and carriers by water, made a modification of that rule necessary so that a deposit of the goods and notice to the consignee were made a substitute for actual delivery. The cases holding to the Massachusetts view go upon the theory that the deposit of the goods in the carrier's warehouse is a quasi delivery, or in lieu of actual delivery, and at once ends the liability as a common carrier, while those which hold the opposite view consider that the carrier is merely relieved from actual delivery but still remains liable as carrier until the consignee receives his goods, or until he has failed to call for them within a reasonable time after notice.²⁵ In all such cases, it has been well stated, the

Rep. 406; *Parker v. Milwaukee, etc., R. Co.*, 30 Wis. 689, 7 Am. Ry. Rep. 255; *Wood v. Milwaukee, etc., R. Co.*, 27 Wis. 541, 9 Am. Rep. 465; *Wood v. Crocker*, 18 Wis. 345, 86 Am. Dec. 773; *Milwaukee, etc., R. Co. v. Fairchild*, 6 Wis. 403.

U. S.—*The City of Lincoln*, 25 Fed. 835; *The Mary Washington*, 1 Abb. (U. S.) 1, Chase's Dec. (U. S.) 125, as to common carriers by water. *Hardman v. Montana Union R. Co.*, 48 U. S. App. 570, 83 Fed. 88, 27 C. C. A. 407, 39 L. R. A. 300.

W. Va.—*Berry v. West Virginia, etc., R. Co.*, 44 W. Va. 538, 30 S. E. 143, 11 Am. & Eng. R. Cas. N. S. 103.

24. *Eng.*—*Chapman v. Great Western R. Co.*, 5 Q. B. Div. 278, 49 L. J. Q. 420, 42 L. T. N. S. 252; *Bradshaw v. Irish Northwestern R. Co.*, 7 Ir. R. C. L. 252; 21 W. R. 581; *Shepherd v.*

Bristol, etc., R. Co., L. R. 3 Exch. 189, 37 L. J. Exch. 113; *Mitchell v. Lancashire, etc., R. Co.*, L. R. 10 Q. B. 256; *Neston Colliery Co. v. London, etc., R. Co.*, 4 Ry. & C. T. Cas. 257; *Rowe v. Pickford*, 8 Taunt. 83, 4 E. C. L. 27; *Matter of Webb*, 8 Taunt. 443, 4 E. C. L. 159; *Garside v. Trent, etc., Nav. Co.*, 4 T. R. 581.

Can.—*Richardson v. Canadian Pac. R. Co.*, 19 Ont. Rep. 369, 45 Am. & Eng. R. Cas. 413. But see *Hall v. Grand Trunk R. Co.*, 34 N. C. Q. B. 517; *Bowie v. Buffalo, etc., R. Co.*, 7 U. C. C. P. 191; *Inman v. Buffalo, etc., R. Co.*, 7 U. C. C. P. 325; *O'Neill v. Great Western R. Co.*, 7 U. C. C. P. 203; *Millon v. Grand Trunk R. Co.*, 21 Ont. App. Rep. 404.

25. See cases cited under § 3 and this section, *supra*.

question to be determined is whether anything remains to be done by the carrier in completion of its contract to safely carry and deliver the goods at the place of destination. If there is, its liability as carrier continues. If there is not, and the goods remain in the possession of the carrier, its liability in respect thereof, when not varied by contract or usage, is as warehouseman only.²⁶ A railroad company does not cease to be a carrier and become a warehouseman by placing goods upon a wharf, with notice to a steamship company, which has not taken actual custody of them, to remove them as soon as possible.²⁷ Where a consignee of goods shipped over defendant's line called for them and was told that they were there, but could not be delivered to him until the next day, and they were destroyed by fire that night, defendant's liability was that of a carrier; the warehouseman's liability not commencing until after the consignee, acting with reasonable promptness, has had a chance to remove the goods.²⁸ To change the relation of a corporation to a trunk, which it has transported and still holds under its contract of carriage, from that of carrier to one holding it on storage, it is enough that it contracts for storage thereof; delivery thereof by it under its first contract, and then redelivery to it under its second contract, not being necessary.²⁹ That a consignee paid freight charges on a shipment and signed the waybill without removing the shipment, which arrived a few days before, did not show release of the company's liability as warehouseman.³⁰ A carrier must show some open act

26. *Gregg v. Illinois Cent. R. Co.*, 147 Ill. 550, 37 Am. St. Rep. 238, 61 Am. & Eng. R. Cas. 212; *Chicago, etc., R. Co. v. Warren*, 16 Ill. 502, 63 Am. Dec. 317; *East St. Louis, etc., R. Co. v. Wabash, etc., R. Co.*, 123 Ill. 594; *Missouri Pac. R. Co. v. Chicago, etc., R. Co.*, 25 Fed. 317. See also, *Chicago, etc., R. Co. v. Sawyer*, 69 Ill. 285, 18 Am. Rep. 613.

27. *Texas, etc., R. Co. v. Clayton*,

173 U. S. 348, 43 L. Ed. 725, Adv. S. U. S. 475, 19 Sup. Ct. Rep. 421, 13 Am. & Eng. R. Cas. U. S. 236. See also *Texas, etc., R. Co. v. Reiss*, 99 Fed. 1006, 39 C. C. A. 680.

28. *Fisher v. Northern Pac. Ry. Co.*, 49 Wash. 258, 94 Pac. 1073.

29. *Bondy v. American Transfer Co.*, 15 Cal. App. 746, 115 Pac. 965.

30. *Saunders v. Southern Ry. Co.*, 90 S. C. 79, 72 S. E. 637.

or offer of delivery of goods before its liability can be changed from that of a carrier to that of a warehouseman.³¹ Where a mis-addressed package was not delivered to the consignee for that reason, the carrier having made all reasonable efforts to find the consignee without success, and a reasonable time having elapsed for the consignee to call for it, the package remained in the hands of the carrier merely as a warehouseman; the carrier being bound only to guard it as securely as it guarded its own property.³²

§ 5. Change in nature of liability of carrier in general.

Where one who had goods in defendant's warehouse, under storage contract, terminated the storage agreement, paid all defendant's charges, and surrendered the contract, and thereupon directed defendant, who was also a common carrier, to deliver the goods at her residence the same day, and paid the transportation charges, and defendant accepted and entered the order, the defendant, from the time of such acceptance, assumed the relation of carrier.³³ The liability of a railway company as a common carrier does not cease until the goods are deposited in a depot or warehouse.³⁴ Where freight less than a car load was transported by a carrier, its liability as a warehouseman did not begin until it had unloaded the freight at its warehouse at destination, and notified the consignee that it was ready for delivery.³⁵ A carrier cannot be held liable as a warehouseman for the loss of goods, unless it appears that the contract of carriage has been completed.³⁶ If a carrier is delayed a whole season by stress of weather, he is still responsible for the safe-keeping of the goods as a carrier, and

31. *Louisville & N. R. Co. v. Gay*, 143 Ky. 56, 135 S. W. 400.

32. *Mott v. Long Island R. Co.*, 123 N. Y. Supp. 49.

33. *Snelling v. Yetter*, 25 App. Div. (N. Y.) 590, 49 N. Y. Supp. 917, 27 Civ. Proc. R. 158.

34. *Pennsylvania R. Co. v. Naive*,

112 Tenn. 239, 79 S. W. 124, 64 L. R. A. 443.

35. *Wall-Huske Co. v. Southern R. Co.*, 147 N. C. 407, 61 S. E. 277.

36. *Wheeler v. Oceanic Steam Nav. Co.*, 52 Hun (N. Y.) 75, 5 N. Y. Supp. 101, 21 Am. St. Rep. 729. See also *Labar v. Taber*, 35 Barb. (N. Y.) 305, as to shipment by water.

not as a mere warehouseman.³⁷ A common carrier is liable as such for goods intrusted to him from the commencement of the trip until the goods are delivered to the consignee, or until they are stored in a warehouse, where they have not been taken by the consignee after diligence had been exercised to notify him.³⁸ Delivery to a compress by a railroad company under the regulations of the Railroad Commission, requiring a railroad, when requested by the shipper of cotton, to deliver it to the nearest compress on the line of its route for compressing, being at a point between that of shipment and that stipulated by the bill of lading for delivery to the consignee, does not change its liability for the cotton while at the compress from that of common carrier, as it existed at common law, which Texas Rev. St. 1895, art. 320, prevents its limiting to that of warehouseman; but under article 323, providing that the railroad company shall be liable as common carrier from the commencement of the trip till the goods are delivered to the consignee, at the point of destination, the compress is its agent; and it can relieve itself of liability for the burning of the cotton at the compress, under its stipulation against liability for fire, only by pleading and proving that its negligence, or that of its servants, did not contribute to such loss.³⁹

§ 6. Conflict of laws.

The statutory law of one State will be enforced by the courts of other States and the Federal courts, that construction of the statute being taken which is given to it by the highest tribunal of the State which enacted it.⁴⁰ Where goods are shipped from one

37. *Western Transp. Co. v. Newhall*, 24 Ill. (14 Peck) 466, 76 Am. Dec. 760.

38. *Texas & P. Ry. Co. v. Schneider*, 1 White & W. Civ. Cas. Ct. App. (Tex.), § 119.

39. *St. Louis & S. W. Ry. Co. of Texas v. Brass*, (Tex. Civ. App.) 133 S. W. 1075.

40. *Fairfield v. County of Gallatin*, 100 U. S. 47; *County of Leavenworth v. Barnes*, 94 U. S. 70; *Peik v. Chicago, etc., R. Co.*, 94 U. S. 164; *Town of South Ottawa v. Perkins*, 94 U. S. 260; *Township of Elmwood v. Marcy*, 92 U. S. 289; *Adams v. Nashville*, 95 U. S. 19; *Shelby v. Guy*, 11 Wheat. (U. S.) 367; *Leonard v. Columbia*

State to another and after reaching their destination are lost or injured, the carrier will be held liable according to the law of the place of destination in an action brought in that State.⁴¹ But if an action be brought for their loss or injury in the State of the place of shipment, the courts of the latter State will not be bound by the decisions of the courts of the former State upon the general principles of commercial law.⁴² It will follow the law of the place of destination where that law depends upon statute.⁴³

§ 7. What is reasonable time for the removal of goods generally.

In those States which maintain the rule that the liability of a common carrier with respect to the goods carried by it continues for a reasonable time after their arrival at destination in which the consignee must call for and remove his goods, considerable difficulty is experienced in determining what is such reasonable

Steam Nav. Co., 84 N. Y. 48; *Jessup v. Carnegie*, 80 N. Y. 441; *Crum v. Bliss*, 47 Conn. 592; *Russell v. Mad-den*, 95 Ill. 485.

Where contracts have been made or vested rights acquired upon the faith of a construction given to the constitution or statutes of a state by its highest courts, the Federal courts and courts of other states will enforce such contracts and protect such rights although a different construction should subsequently be given by the local courts. *Gelpcke v. City of Dubuque*, 1 Wall. (U. S.) 175; *Havemeyer v. Iowa County*, 3 Wall. (U. S.) 294; *Olcott v. The Supervisors of Fond du Lac*, 16 Wall. (U. S.) 678; *Harris v. Jex*, 55 N. Y. 421.

41. *Springs v. South Bound R. Co.*, 46 S. C. 104, 24 S. E. 166; *Heath v. South Bend R. Co.*, Id.; *Rice v. Hart*, 118 Mass. 201.

42. *Faulkner v. Hart*, 82 N. Y. 413, 37 Am. Rep. 574; *Franklin v. Two-*

good, 25 Iowa 520. The same rule is laid down by the United States courts. *Myrick v. Michigan Cent. R. Co.*, 107 U. S. 102.

In an action brought in Georgia, however, for personal injuries received in South Carolina, it was held that, there being no South Carolina statute regulating the rights of the parties in such cases, the Georgia courts, in a liberal spirit of comity, would apply the common law in South Carolina as construed by its court of last resort. *Atlantic, etc., R. Co. v. Tanner*, 68 Ga. 384. See also *Waters v. Cox*, 2 Bradwell (Ill. App.), 129; *Ames v. McCamber*, 124 Mass. 85; *Cubbedge v. Napier*, 62 Ala. 518; *Haywood v. Daves*, 81 N. C. 8; *Cragin v. Lamkin*, 7 Allen (Mass.), 395; *Williams v. Carr*, 80 N. C. 294.

43. See cases cited in preceding notes to this section.

time. A consignee must promptly and diligently remove goods carried within a reasonable time after arrival, without regard to distance from the depot, or means of removal, or convenience, or necessities of the consignee. Such reasonable time has been defined to be such as would enable one residing in the vicinity of the place of delivery, and informed of the probable time of arrival, in the ordinary course and during the usual hours of business, to inspect and remove the goods.⁴⁴ The question as to what is a reasonable time for a consignee of goods to remove them after notice of their arrival, where there is no dispute as to the facts, is a question of law for the court.⁴⁵ A consignee may not, after notice of the arrival of the goods, defer taking them away while he attends to other affairs, but he must at once and without intermission remove them.⁴⁶ If there be a conflict of evidence as to the material facts, or the facts are doubtful, the question as to what was a reasonable time under the circumstances of the particular case should be submitted to the jury.⁴⁷ So, also, if any doubt or question is made as to whether the goods were lost while the carrier was liable as common carrier or as warehouseman.⁴⁸

44. *Berry v. West Virginia, etc.*, R. Co., 44 W. Va. 538, 30 S. E. 143, 11 Am. & Eng. R. Cas. N. S. 103; *Bell v. St. Louis, etc.*, R. Co., 6 Mo. App. 363; *Jeffersonville R. Co. v. Cleveland*, 2 Bush (Ky.) 473; *Leavenworth, etc., R. Co. v. Maris*, 16 Kans. 333; *Wood v. Crocker*, 18 Wis. 345, 86 Am. Dec. 773; *Derosia v. Winona, etc.*, R. Co., 18 Minn. 133; *Broadwell v. Butler*, 6 McLean (U. S.) 296.

45. *Hedges v. Hudson River R. Co.*, 49 N. Y. 223, 3 Am. Ry. Rep. 346; *Bennett v. Lyeoming, etc., Ins. Co.*, 67 N. Y. 278; *Poythress v. Durham & S. Ry. Co.*, 148 N. C. 391, 62 S. E. 515, 18 L. R. A. (N. S.) 427; *Davis v. Gwynne*, 57 N. Y. 677; *Lemke v. Chicago, etc., R. Co.*, 39

Wis. 449, 13 Am. Ry. Rep. 406; *Frank v. Grand Tower, etc., R. Co.*, 57 Mo. App. 181.

46. *Tarbell v. Royal Exchange Shipping Co.*, 110 N. Y. 180, 17 N. E. 721, 6 Am. St. Rep. 300; *Hedges v. Hudson River R. Co.*, *supra*; *Roth v. Buffalo, etc., R. Co.*, 34 N. Y. 548, 90 Am. Dec. 734.

47. *Wood v. Milwaukee, etc., R. Co.*, 27 Wis. 541, 9 Am. Rep. 465, 2 Am. Ry. Rep. 342; *Coxon v. North Eastern R. Co.*, 4 Ry. & C. T. Cas. 284. See also cases cited under preceding notes to this section.

48. *Sessions v. Western R. Corp.*, 16 Gray (Mass.) 132; *Columbus, etc., R. Co. v. Ludden*, 89 Ala. 612, 42 Am. & Eng. R. Cas. 404; *Lamb v. Camden, etc., R. Co.*, 2 Daly (N. Y.) 454.

The reasonable time allowed to the consignee in which to remove the goods commences only after notice to or actual knowledge by him of their arrival, in those States where notice is required;⁴⁹ while in other States, the consignee is charged with knowledge of their arrival and is not entitled to notice or to a reasonable time to learn of their arrival.⁵⁰ The liability of a carrier may be changed to that of a warehouseman or ordinary bailee, before the elapse of a reasonable time for removal, by the acts of the parties, as where the goods are deposited on the platform in the usual place ready for delivery, the consignee notified thereof, and he pays the freight;⁵¹ or where the consignee has receipted for the goods and paid the charges and removed a part of the goods;⁵² or the goods have been stored in a warehouse of the carrier, by express direction of the consignee, subject to call;⁵³ or where the carrier, by agreement with the consignee and for mutual convenience, stores goods on arrival in its freight house for the night.⁵⁴ Where the carrier is ready to deliver and the consignee refuses to take away his goods, the carrier can only be held thereafter as bailee of the owner, or, in the event that it charges for storage, as warehouseman.⁵⁵ The fact that the consignee resides at a distance from the

49. See *Necessity of Notice*, § 10, *post*; *Michigan Cent. R. Co. v. Hale*, 6 Mich. 243.

50. *Berry v. West Virginia, etc., R. Co.*, 44 W. Va. 538, 30 S. E. 143, 11 Am. & Eng. R. Cas. N. S. 103. See also *Notice to Consignee*, § 9, *post*.

51. *New Albany, etc., R. Co. v. Campbell*, 12 Ind. 55.

52. *Oderkirk v. Fargo*, 58 Hun (N. Y.) 347, 34 St. Rep. (N. Y.) 166, 11 N. Y. Supp. 371.

53. *Hartman v. Louisville, etc., R. Co.*, 39 Mo. App. 88; *Chapman v. Great Western R. Co.*, 5 Q. B. Div. 278, 49 L. J. Q. B. 420; *McCosson v. Grand Trunk R. Co.*, 23 U. C. C. P. 107; *Matter of Webb*, 8 Taunt, 443,

4 E. C. L. 159; *Rowe v. Pickford*, 8 Taunt. 83, 4 E. C. L. 27; *Garside v. Trent, etc., Nav. Co.*, 4 T. R. 581; *Mayer v. Grand Trunk R. Co.*, 31 U. C. C. P. 248.

54. *Fenner v. Buffalo, etc., R. Co.*, 44 N. Y. 505, 4 Am. Rep. 709; *Blumenthal v. Brainard*, 38 Vt. 402, 91 Am. Dec. 350; *Southern Express Co. v. Holland*, 109 Ala. 362.

55. *Hathorn v. Ely*, 28 N. Y. 78; *Stowe v. New York, etc., R. Co.*, 113 Mass. 521; *Rothschild v. Michigan Cent. R. Co.*, 69 Ill. 164; *Mohr v. Chicago, etc., R. Co.*, 40 Iowa 579; *American Sugar Refining Co. v. McGhee*, 96 Ga. 27; *Missouri Pac. R. Co. v. Chicago, etc., R. Co.*, 25 Fed. 317,

place of delivery, or is absent therefrom and has no agent there, is not to be taken into consideration in determining what is a reasonable time in which he should remove the goods, nor is it to be measured by any peculiar circumstances in his condition and situation rendering him unable promptly to take the goods away.⁵⁶ If the responsibility of a carrier have once terminated, by safely delivering the goods to the consignee, it cannot be revived by the latter returning them to the carrier's warehouse, without notice to the warehouseman.⁵⁷ Ordinarily, it is the carrier's duty to unload the goods and deposit them in its warehouse, or on its platform or wharf in the usual and proper place to afford opportunity to the consignee to remove them, and the reasonable time for removal does not begin to run until this has been done.⁵⁸ Where, however, it is the consignee's duty, by reason of usage or special contract, to unload the goods, the carrier's duty is discharged when the goods are placed in a safe and convenient location for unloading, as by placing the cars on a side track, or at an elevator or warehouse, where the consignee may unload them, and its liability as a common carrier ceases after the consignee has had reasonable opportunity to call for and remove them.⁵⁹ Where

23 Am. & Eng. R. Cas. 718; *Kremer v. Southern Express Co.*, 6 Coldw. (Tenn.) 356; *Young v. Smith*, 3 Dana (Ky.) 91, 28 Am. Dec. 57.

56. *Northrup v. Syracuse, etc., R. Co.*, 3 Abb. App. (N. Y.) 386, 5 Abb. Pr. N. S. (N. Y.) 425; *Hilliard v. Wilmington, etc., R. Co.*, 6 Jones L. (N. C.) 343; *Lemke v. Chicago, etc., R. Co.*, 39 Wis. 449, 13 Am. Ry. Rep. 406; *Richardson v. Canadian Pac. R. Co.*, 19 Ont. Rep. 369, 45 Am. & Eng. R. Cas. 413; *Moses v. Boston, etc., R. Co.*, 32 N. H. 523, 64 Am. Dec. 391; *Wilson v. California Cent. R. Co.*, 94 Cal. 166, 55 Am. & Eng. R. Cas. 625; *Chalk v. Charlotte, etc., R. Co.*, 85 N. C. 423, 9 Am. & Eng. R. Cas. 106;

Columbus, etc., R. Co. v. Ludden, 89 Ala. 612, 42 Am. & Eng. R. Cas. 404.

57. *Salinger v. Simmons*, 8 Abb. Pr. N. S. (N. Y.) 409, 2 Lans. (N. Y.) 325, 57 Barb. (N. Y.) 513.

58. *King v. New Brunswick, etc., S. Co.*, 36 Misc. Rep. (N. Y.) 555, 73 N. Y. Supp. 999; *Hedges v. Hudson River R. Co.*, 49 N. Y. 223, 3 Am. Ry. Rep. 346; *Chicago, etc., R. Co. v. Bensley*, 69 Ill. 630; *McHenry v. Philadelphia, etc., R. Co.*, 4 Harr. (Del.) 448; *Missouri Pac. R. Co. v. Haynes*, 72 Tex. 175; *Mohr v. Chicago, etc., R. Co.*, 40 Iowa 579.

59. *Draper v. Delaware, etc., Canal Co.*, 118 N. Y. 118, 42 Am. & Eng. R. Co. 410; *Gregg v. Illinois Cent. R.*

the consignee has paid the freight and taken steps toward removing the goods and is afforded a reasonable opportunity for so doing, and unnecessarily delays the removal, the carrier cannot be held responsible.⁶⁰ Nor is the carrier longer responsible after delivery to an elevator company, although a receipt for the goods in accordance with the usual custom has not been taken.⁶¹ What was a reasonable time and what was not a reasonable time in which the consignee should call for and remove his goods has been adjudged in many cases under various circumstances, some of which are referred to in the notes.⁶²

Co., 147 Ill. 550, 37 Am. St. Rep. 238, 61 Am. & Eng. R. Cas. 208; Pindell v. St. Louis, etc., R. Co., 41 Mo. App. 84; Independence Mill Co. v. Burlington, etc., R. Co., 72 Iowa 535, 2 Am. St. Rep. 258, 32 Am. & Eng. R. Cas. 456; Pittsburgh, etc., R. Co. v. Nash, 43 Ind. 423.

60. *Goodwin v. Baltimore, etc., R. Co.*, 50 N. Y. 154, 10 Am. Rep. 457, revg. 58 Barb. (N. Y.) 195; *Woodward v. Illinois Cent. R. Co.*, 33 Ill. App. 433.

61. *Arthur v. St. Paul, etc., R. Co.*, 38 Minn. 95, 32 Am. & Eng. R. Cas. 449.

62. **Reasonable time.**—*Wynantskill Knitting Co. v. Murray*, 90 Hun (N. Y.) 554, 36 N. Y. Supp. 26, from Saturday afternoon until the following Wednesday; *Tarbell v. Royal Exchange Shipping Co.*, 110 N. Y. 170, 6 Am. St. Rep. 350; *Backhaus v. Chicago, etc., R. Co.*, 92 Wis. 393, three days; *Chalk v. Charlotte, etc., R. Co.*, 85 N. C. 423, 9 Am. & Eng. R. Cas. 106, two days; *Lemke v. Chicago, etc., R. Co.*, 39 Wis. 449, 13 Am. Ry. Rep. 406, from Saturday evening until the Tuesday following, at noon; *Columbus, etc., R. Co. v. Ludden*, 89 Ala.

612, 42 Am. & Eng. R. Cas. 404, three days; *Derosia v. Winona, etc., R. Co.*, 18 Minn. 133, 8 Am. Ry. Rep. 363; *Anniston, etc., R. Co. v. Ledbetter*, 92 Ala. 326, six days; *Leavenworth, etc., R. Co. v. Maria*, 16 Kan. 333, eight days; *Arthur v. St. Paul, etc., R. Co.*, 38 Minn. 95, 32 Am. & Eng. R. Cas. 449, one day; *Solomon v. Philadelphia, etc., Express Steamboat Co.*, 2 Daly (N. Y.) 104, from Saturday morning to the following Monday morning; *Blumenthal v. Brainerd*, 38 Vt. 402, 91 Am. Dec. 350, over night, where the consignee had called for a box at defendant's depot, found it ready, and left it there, intending to call for it the next morning; *United Fruit Co. v. New York & B. Transp. Co.*, 104 Md. 567, 65 Atl. 415, where consignee had the rest of the day after noon and the whole of the following day to remove the goods.

Not a reasonable time.—*McKinney v. Jewett*, 90 N. Y. 267, 9 Am. & Eng. R. Cas. 209, where consignees were not notified of the arrival of goods until Saturday evening, too late for removal, and before they could be removed on Monday morning following, they were injured;

§ 8. Time extended by failure or refusal to deliver.

Where goods, after arrival at their destination, have been applied for or demanded, but are refused or detained by the carrier, except where the goods are properly held for freight charges due, the carrier's liability as an insurer of the goods may be extended beyond what would ordinarily be a reasonable time and be continued until a reasonable time after the goods have been offered for delivery to the consignee.⁶³ The carrier's liability as a common carrier continues without regard to the time the goods may have actually been ready for delivery, where the consignee is prevented, without fault on his own part, from removing and caring for his goods by reason of the failure of the carrier to have the goods ready for delivery, or so placed that they can be unloaded with reasonable convenience;⁶⁴ or because of being wrongly informed by the carrier or its agent, through mistake, on calling for the goods, that they have not arrived, although they have arrived and are stored in the depot or warehouse;⁶⁵ or by any similar

Woodward v. Illinois Cent. R. Co., 33 Ill. App. 433; Wood v. Crocker, 18 Wis. 345, 86 Am. Dec. 773, where goods were destroyed by fire under similar circumstances; Louisville, etc., R. Co. v. McGuire, 79 Ala. 395; Parker v. Milwaukee, etc., R. Co., 30 Wis. 689, 7 Am. Rep. 255, where goods arriving during the day and were destroyed by fire on the following night; Louisville, etc., R. Co. v. Oden, 80 Ala. 38, where goods arrived on Friday, but consignee was told Saturday morning that they had not arrived, and they were burned on Sunday; Lake Erie, etc., R. Co. v. Hatch, 52 Ohio St. 408, where consignee was notified at six o'clock in the evening and the goods were burned during the following night; Moses v. Boston, etc., R. Co., 32 N. H. 523, 64 Am. Dec. 381, where goods

arrived between 1 and 3 P. M. and were burned in the warehouse the following night; Dunham v. Boston, etc., R. Co., 46 Hun (N. Y.) 245, where the consignee began removing the goods as soon as they arrived, but before he could remove all a part remaining in the car burned; Central of Ga. Ry. Co. v. A. F. Merrill & Co., 153 Ala. 277, 45 So. 628, seven hours.

63. Faulkner v. Hart, 82 N. Y. 413, 37 Am. Rep. 574; Louisville, etc., R. Co. v. McGuire, 79 Ala. 395; Richmond, etc., R. Co. v. White, 88 Ga. 805, 15 S. E. 802, 12 Ry. & Corp. L. J. 273.

64. Independence Mills Co. v. Burlington, etc., R. Co., 72 Iowa 535, 2 Am. St. Rep. 258, 32 Am. & Eng. R. Cas. 456.

65. McKinney v. Jewett, 90 N. Y.

conduct or wrongful act on the part of the carrier.⁶⁶ In some jurisdictions the carrier is held not to continue liable as an insurer by reason of such failure in the goods being delivered through misinformation or mistake on the part of the carrier, but is held liable as a warehouseman on the ground that its negligence in failing to deliver the goods, or causing them to be detained, is the proximate cause of loss.⁶⁷ But where by the terms of the contract of shipment the liability is that of a warehouseman, negligence must be shown to render the carrier liable.⁶⁸ And where the consignee has had sufficient time for the removal of the goods after the discovery and correction of a mistake as to their arrival, and notice thereof, the carrier is not liable for loss on the ground of conversion.⁶⁹

§ 9. Notice to consignee held not essential.

Those authorities which maintain the Massachusetts doctrine that the carrier's liability as insurer in the case of railroads, ends, and it assumes the liability of a warehouseman upon the completion of the transportation and a safe storage of the goods, also hold that the carrier is under no obligation, upon the arrival of the goods at their destination, to give the consignee notice of their

267, 9 Am. & Eng. R. Cas. 209; Meyer v. Chicago, etc., R. Co., 24 Wis. 566, 1 Am. Rep. 207; Burlington, etc., R. Co. v. Arms, 15 Neb. 69, 16 Am. & Eng. R. Cas. 272; Jeffersonville R. Co. v. Cotton, 29 Ind. 498, 95 Am. Dec. 656; Louisville, etc., R. Co. v. Campbell, 7 Heisk. (Tenn.) 258.

66. *Campion v. Canadian Pac. R. Co.*, 43 Fed. 775; *Derosia v. Winona, etc.*, R. Co., 18 Minn. 133, 8 Am. Ry. Rep. 363.

67. *Central Trust Co. v. East Tennessee, etc., R. Co.*, 70 Fed. 764; *Stevens v. Boston, etc., R. Co.*, 1 Gray (Mass.) 277; *Kansas City, etc., R. Co. v. Morrison*, 34 Kan. 502, 55

Am. Rep. 252, 23 Am. & Eng. R. Cas. 481; *Union Pac. R. Co. v. Moyer*, 40 Kan. 184, 10 Am. St. Rep. 183, 35 Am. & Eng. R. Cas. 615; *East Tennessee, etc., R. Co. v. Kelly*, 91 Tenn. 699, 55 Am. & Eng. R. Cas. 621; *Bowie v. Buffalo, etc., R. Co.*, 7 U. C. C. P. 191.

68. *Draper v. Delaware, etc., Canal Co.*, 118 N. Y. 118, 42 Am. & Eng. R. Cas. 410; *Fenner v. Buffalo, etc., R. Co.*, 44 N. Y. 505, 4 Am. Rep. 709.

69. *Williams v. Delaware, etc., Canal Co.*, 53 Hun (N. Y.) 635, 25 St. Rep. (N. Y.) 518, 6 N. Y. Supp. 36, 3 Silv. Sup. Ct. (N. Y.) 19.

arrival, and its liability is not affected by a failure to give such notice. The consignee is charged with notice of the arrival of the goods, the reasons for the rule being stated that the consignee is reasonably assumed to have been advised by the shipper of the time the goods are likely to arrive, and that it is more just and reasonable to place upon him the duty of keeping track of his own goods than to charge the carrier with the practically impossible burden of notifying each consignee of the time of arrival of each package passing through its hands.⁷⁰ This view has been followed in certain other jurisdictions.⁷¹

§ 10. Necessity of notice maintained.

On the other hand, those authorities which maintain the New Hampshire doctrine that in the case of railroads the carrier's liability as an insurer continues after the arrival of the goods at their destination, until the consignee has had a reasonable time in which to call for and remove his goods, hold that such liability continues until the consignee has been notified by the carrier of the arrival of the goods, and that in order to change the responsibility to that of a warehouseman, notice to the consignee is necessary. This rule is based upon the reasoning that it is unreasonable to require the consignee to be in constant attendance at the place of destination in order to ascertain the arrival of the goods, and that it is reasonable that the carrier's liability should not be reduced to that of a warehouseman only, until after notice has been given to the consignee of the arrival of the goods and the lapse of a reasonable time thereafter in which to take them away.⁷² The

70. See authorities cited under § 3, *ante*.

71. *Morris, etc., R. Co. v. Ayers*, 29 N. J. L. 393, 80 Am. Dec. 215; *Spears v. Spartanburg, etc., R. Co.*, 11 S. C. 158; *Collins v. Alabama, etc., R. Co.*, 104 Ala. 390, 61 Am. & Eng. R. Cas. 229, and other Ala-

bama cases cited under § 4, *ante*. The rule in this state has been changed in some cases by statute. See also *Jeffersonville, etc., R. Co. v. Cleveland*, 2 Bush (Ky.) 468.

72. See authorities generally cited under § 4, note 1, *ante*.

statutes in several of the States require such notice to be given.⁷³ The carrier is also bound to give notice in all cases where it specially contracts to do so, although such notice is not required in the absence of contract.⁷⁴ The carrier may be excused from giving notice to the consignee, although required to do so, where the consignee or his agent already had actual knowledge of the arrival of the goods;⁷⁵ or where notice cannot be given because the consignee has no place of business or residence at the point of destination or he or his address are unknown to the carrier and cannot be ascertained,⁷⁶ or where an established course of business or usage known to both consignee and carrier has dispensed with such notice.⁷⁷ The giving of notice, where it is necessary, will not affect the liability of the carrier for injuries which have already been sustained by the goods.⁷⁸ The rule is well estab-

73. *Wilson v. California Cent. R. Co.*, 94 Cal. 166, 17 L. R. A. 685; *Hirshfield v. Central Pac. R. Co.*, 56 Cal. 484, 7 Am. & Eng. R. Cas. 398; *Butler v. East Tennessee, etc., R. Co.*, 8 Lea (Tenn.), 33, 9 Am. & Eng. R. Cas. 249; *Collins v. Alabama, etc., R. Co.*, 104 Ala. 300; *Missouri Pac. R. Co. v. Haynes*, 72 Tex. 175, 37 Am. & Eng. R. Cas. 645; *Houston, etc., R. Co. v. Adams*, 49 Tex. 748, 30 Am. Rep. 116. See also statutes of Alabama, California, Tennessee and Texas.

74. *Tanner v. Oil Creek R. Co.*, 53 Pa. St. 411, and the company's freight agent may bind the company by an agreement to give such notice.

75. *Fenner v. Buffalo, etc., R. Co.*, 44 N. Y. 505, 4 Am. Rep. 709; *Pinney v. First Div. St. Paul, etc., R. Co.*, 19 Minn. 251; *Bradshaw v. Irish Northwestern R. Co.*, 21 W. R. 581; *Richardson v. Canadian Pac. R. Co.*, 19 Ont. Rep. 369, 45 Am. & Eng. R. Cas. 413.

76. *Pelton v. Rensselaer, etc., R. Co.*, 54 N. Y. 214, 13 Am. Rep. 568; *Northrop v. Syracuse, etc., R. Co.*, 3 Abb. App. Dec. (N. Y.) 386, 5 Abb. Pr. N. S. (N. Y.) 425; *Butler v. East Tennessee, etc., R. Co.*, 8 Lea (Tenn.), 33, 9 Am. & Eng. R. Cas. 249; *Kohn v. Packard*, 3 La. 224, 23 Am. Dec. 453.

77. *Gibson v. Culver*, 17 Wend. (N. Y.) 305, 31 Am. Dec. 297; *J. Russell Mfg. Co. v. New Haven Steamboat Co.*, 50 N. Y. 121, 52 N. Y. 657; *Ely v. New Haven Steamboat Co.*, 53 Barb. (N. Y.) 207; *Pindell v. St. Louis, etc., R. Co.*, 34 Mo. App. 675; *The Mary Washington*, Chase's Dec. (U. S.) 125. Compare *Mierson v. Hope*, 2 Sweeny (N. Y.), 561; *Dean v. Vaccaro*, 2 Head (Tenn.), 488, 75 Am. Dec. 744.

78. *The Mary Washington*, Chase's Dec. (U. S.) 125; *Richmond, etc., R. Co. v. White*, 88 Ga. 805, 15 S. E. 802, 12 Ry. & Corp. L. J. 273.

lished in reference to carriers by water, owing to their peculiar methods of transportation, that ordinarily they must notify the consignee of the arrival of goods before their liability as carriers terminates; but such notice may be waived by former course of dealing with the consignee, or by usage prevailing among carriers in the same trade at that port.⁷⁹

§ 11. Sufficiency of notice.

A notice is sufficient which actually informs the consignee of the arrival of his goods at the place of destination.⁸⁰ A newspaper notice, addressed to the public generally, is not a valid notice, unless shown to have been brought to the consignee's attention.⁸¹ If notice be sent by mail, instead of being given personally, the carrier must bear the consequences of any delay in its receipt, and the positive evidence of the consignee that he did not receive a mailed notice until a certain date is entitled to greater weight than the inference that he received it at an earlier date, which may be drawn from the fact of its being mailed at an earlier date.⁸² Where a statute requires a notice to be mailed proof of mailing is sufficient without production of the notice itself.⁸³

79. *Illinois Cent. R. Co. v. Carter*, 165 Ill. 570, 46 N. E. 374, revg. 62 Ill. App. 618; *McAndrew v. Whitlock*, 52 N. Y. 40, 11 Am. Rep. 657; *The Boskenna Bay*, 40 Fed. 93; *Tarbell v. Royal Exchange Shipping Co.*, 110 N. Y. 170; *Lake Erie, etc., R. Co. v. Hatch*, 52 Ohio St. 408; *Basnight v. Atlantic, etc., R. Co.*, 111 N. C. 592; *Brand v. New Jersey Steamboat Co.*, 10 Misc. Rep. (N. Y.) 128; *Frank v. Grand Tower, etc., R. Co.*, 57 Mo. App. 181; *Allam v. Pennsylvania R. Co.*, 138 Pa. 104, 41 W. N. C. 205, 38 Atl. 709, 39 L. R. A. 535; *Hill Mfg. Co. v. Boston, etc., R. Corp.* 104 Mass. 122, 6 Am. Rep. 202; *Shenk v. Philadelphia Steam Pro-*

pellor Co., 60 Pa. St. 109, 100 Am. Dec. 541; *Hermann v. Goodrich*, 21 Wis. 536; 94 Am. Dec. 562; *Kohn v. Packard*, 3 La. 224, 23 Am. Dec. 453; *Richardson v. Canadian Pac. R. Co.*, 19 Ont. Rep. 369, 45 Am. & Eng. R. Cas. 413; *Bourne v. Gatliff*, 42 E. C. L. 337, 33 E. O. L. 364, 3 M. & G. 643, 11 Cl. & F. 45

80. *Cavallaro v. Texas, etc., R. Co.*, 110 Cal. 348, 42 Pac. 918.

81. *Rome R. Co. v. Sullivan*, 14 Ga. 277.

82. *Solomon v. Philadelphia, etc., Steamboat Co.*, 2 Daly (N. Y.), 104.

83. *Collins v. Alabama, etc., R. Co.*, 104 Ala. 390.

Notice to a husband is notice to the wife where the facts warrant the presumption that the husband was acting as the wife's agent.⁸⁴ Notice may be implied from the general usage and course of business between the parties, in which case it is not necessary to prove notice.⁸⁵ Under a statute providing that a carrier shall be liable only as a warehouseman after it has used due diligence to notify consignee of the arrival of the goods, what is due diligence depends upon the circumstances of the case.⁸⁶ Where failure of an express company to give notice by mail of the arrival of a package, when such is the adopted mode, is not the proximate cause of delay in removing the package, and the loss would have occurred if it had been mailed, and sufficient time had elapsed for the receipt thereof if notice had been mailed, and the consignee had exercised reasonable diligence, the carrier is liable as warehouseman only.⁸⁷

§ 12. Notice to consignor.

It is quite generally held that when goods sent by a common carrier have arrived at their destination, and have been tendered to and refused by the consignee, the contract for their carriage has been performed, and after the consignee has had a reasonable time to call for and receive them, the carrier becomes merely a warehouseman, and responsible for the care of a warehouseman in protecting the consignor's interest, and is not bound, as a general rule, to notify the consignor of the non-acceptance of the goods by the consignee.⁸⁸ Where goods are received by a carrier, to be delivered

84. *Furman v. Chicago, etc., R. Co.*, 68 Iowa 219, 23 Am. & Eng. R. Cas. 730. *Express Co.*, 63 W. Va. 128, 59 S. E. 949.

85. *Wood v. Milwaukee, etc., R. Co.*, 27 Wis. 541, 9 Am. Rep. 465, 2 Am. Ry. Rep. 342. *88. Kremer v. Southern Express Co.*, 6 Coldw. (Tenn.) 356; *Steamboat Keystone v. Moies*, 28 Mo. 243, 75 Am. Dec. 123; *Lesinsky v. Great Western Dispatch*, 13 Mo. App. 575;

86. *St. Louis, etc., Ry. Co. v. Hicks*, (Tex. Civ. App.) 158 S. W. 192. *Hull v. Missouri Pac. R. Co.*, 60 Mo. App. 593; *Hudson v. Baxendale*, 2

87. *Hutchinson v. United States H. & N.* 575.

to the consignee, on payment of the amount due therefor, if the latter be not prepared to pay, on notice of their arrival, but promise to do so in a few days, but before payment the carrier's office is broken into and the goods stolen, or the goods are destroyed by fire, the carrier's liability, after notification to the consignee, is that of a warehouseman only, and the authorities would not seem to require notice to the consignor in such a case, though notice may be sometimes necessary.⁸⁹ The carrier must conduct itself as a reasonable and prudent man would do with reference to it, and whether it is reasonable that it should give such notice may be a question for the jury, but it is not liable for omitting to give it unless it is the failure to give such notice which caused the loss.⁹⁰ The carrier is not liable to the consignor for failure to give him notice of the refusal of the consignee to receive goods, where the consignor has failed to disclose his name and address.⁹¹ It has been held, on the other hand, that where goods transported by an express company are by it tendered to the consignee, and he fails to receive and pay for them, the express company is under obligation to notify the consignor. When this is done, the company is relieved of its responsibility as a common carrier, and holds the goods subject to the order of the consignor; but not

89. *Weed v. Barney*, 45 N. Y. 344, 6 Am. Rep. 96; *Grossman v. Fargo*, 6 Hun (N. Y.), 310; *Gibson v. American Merchants', etc., Express Co.*, 1 Hun (N. Y.), 389, 3 T. & C. (N. Y.) 503; *Landsberg v. Dinsmore*, 4 Daly (N. Y.), 490.

90. *Weed v. Barney*, 45 N. Y. 344, 6 Am. Rep. 96; *Morrison v. Davis*, 20 Pa. St. 171, 57 Am. Dec. 645; *Denny v. New York Cent. etc., R. Co.*, 13 Gray (Mass.), 481, 74 Am. Dec. 645; *Hudson v. Baxendale*, 2 H. & N. 575. See also *Zinn v. New Jer-*

sey Steamboat Co., 49 N. Y. 442, 10 Am. Rep. 402.

91. *Williams v. Holland*, 22 How. Pr. (N. Y.) 137.

Where the consignee is not a resident of the place of delivery, and the carrier after due inquiry is unable to find him and delivers the goods to other merchants for him, such delivery being *bona fide* and according to the usage of trade, the carrier is not liable to the consignor. *Mayell v. Potter*, 2 Johns. Cas. (N. Y.) 371. See also *Fisk v. Newton*, 1 Den. (N. Y.) 45, 43 Am. Dec. 649.

before.⁹² And in other cases, that the carrier's liability as such terminates when the carrier tenders delivery to the consignee and the latter declines to receive the goods, and it becomes chargeable as a warehouseman only, but as such it is chargeable with the duty of notifying the consignor of the refusal, and the further duty of holding the goods subject to the orders of the consignor.⁹³

§ 13. Liability of connecting carriers.

In the case of connecting carriers where goods pass over several connecting lines, the rule as to the carrier's liability as insurer terminating upon its depositing the goods in its warehouse does not apply, but in such a case, the liability of each carrier continues generally as an insurer until it parts with the possession and control of the goods, either by delivering them to the succeeding carrier, or by depositing them in a warehouse, after the failure or refusal of the succeeding carrier to receive them.⁹⁴ But the neglect of the succeeding carrier to receive them for an unreasonable time, after due notice and request, does not amount to a refusal which would justify the carrier in terminating its relation as carrier by a new disposition of the goods.⁹⁵ And where a carrier has received goods for transportation to a point beyond its lines, and there are no means of public transportation from its terminus to the place of destination, its duty is not ended by mere delivery to a warehouseman there, but it must also send notice to the consignee thereof.⁹⁶

92. *American Merchants', etc., Express Co. v. Wolfe*, 79 Ill. 430.

93. *American Sugar Refining Co. v. McGhee*, 96 Ga. 27; *Green, etc., Nav. Co. v. Marshall*, 48 Ind. 596.

94. *Brown, etc., Co. v. Pennsylvania Co.*, 63 Minn. 546, 65 N. W. 961, 2 Am. & Eng. R. Cas. N. S. 640; *Hooper v. Chicago, etc., R. Co.*, 27

Wis. 81, 5 Am. Ry. Rep. 302, 9 Am. Rep. 439; *Michigan Cent. R. Co. v. Mineral Springs Mfg. Co.*, 16 Wall. (U. S.) 318. See also *Connecting carriers*, chap. 20.

95. *Goold v. Chapin*, 20 N. Y. 259, 75 Am. Dec. 398.

96. *Hermann v. Goodrich*, 21 Wis 536, 94 Am. Dec. 562.

§ 14. The burden of proof.

In an action against a carrier for the loss by fire of a car received by it from another company while it is standing on its side track at its destination to be unloaded by the consignee, the burden of proof is on the carrier to prove that its responsibility is that of a warehouseman only, where that defence is set up; the liability of a common carrier having once attached is presumed to continue until the contrary is proven. But the burden of proof to show that its liability as a carrier has again attached is thrown upon the opposing party, when it proves that it has delivered the car upon its side track to the consignee for unloading, where, by its contract, it is bound when the car is unloaded, to transport it to another place.⁹⁷

§ 15. Effect of special contract or usage on rule.

The carrier may stipulate that its liability as insurer shall cease with the arrival of the goods at their destination and their being placed on the platform, or in the storeroom of the company, according as the usage of business may require, and in either case its liability as a common carrier would cease after the consignee had a reasonable time to call for and remove the goods, and it would be liable as warehouseman only.⁹⁸ It may stipulate, by mere notice communicated to the consignee, that it will not be responsible for goods not removed within a reasonable time, and if they are not removed in such time, is liable as a gratuitous bailee, unless a charge is made for storage during that time.⁹⁹ It may stipulate that the goods must be removed on the day of arrival or stored at the owner's risk, and in case of destruction in the station,

97. *Peoria, etc., R. Co., v. United States Rolling Stock Co.*, 136 Ill. 643, 29 Am. St. Rep. 348, 49 Am. & Eng. R. Cas. 81, 27 N. E. 59, 10 Ry. & Corp. L. J. 247, revg. 36 Ill. App. 552.

98. *Draper v. Delaware, etc., Canal Co.*, 118 N. Y. 118, 42 Am. &

Eng. R. Cas. 410; *Fenner v. Buffalo, etc., R. Co.*, 44 N. Y. 505, 4 Am. Rep. 709.

99. *Harris v. Great Western R. Co.*, 1 Q. B. Div. 515, 45 L. J. Q. B. Div. 729; *Van Toll v. South Eastern R. Co.*, 12 C. B. N. S. 75, 104 E. C. L. 75, 31 L. J. C. P. 241.

that no damage shall accrue, and no notice of the arrival need be given the consignee under such a stipulation.¹ But where a charge is made for storage, such a stipulation does not qualify the duty of the carrier as warehouseman and free it from the ordinary responsibility to take reasonable care, and it is, therefore, liable for damage happening through its negligence.² A railroad company, acting as a common carrier, may stipulate, by a contract express or implied, that its liability as a carrier shall terminate with a delivery at a particular point, and that it will assume no liability at all, in such case, as warehouseman; and if the consignee is fully advised at the time of the shipment that the company has no agent at the particular station or place to which the consignment is made, and the failure to employ such agent is not shown to be unreasonable in view of the condition of the company's business, there is, in the absence of rebutting circumstances, an implied consent that the carrier's responsibility shall be dissolved, when he has done all that the nature of the case permits him to do, according to the reasonable and proper usages of his business.³ Under a bill of lading for the delivery of goods, at the place of destination, to a transient person, if, on arrival, he cannot be found, on inquiry, the carrier is relieved from responsibility by delivering the goods to a responsible third party there for the consignee, it having acted *bona fide* and according to the usage of trade;⁴ and if the consignee be unable

1. *Gashweiler v. Wabash, etc., R. Co.*, 83 Mo. 112, 25 Am. & Eng. R. Cas. 403, 53 Am. Rep. 558.

2. *Mitchell v. Lancashire, etc., R. Co.*, 44 L. J. Q. B. 107, L. R. 10 Q. B. 256. See also *Kimball v. Western R. Corp.*, 6 Gray (Mass.) 542.

3. *South, etc., Alabama R. Co. v. Wood*, 66 Ala. 167, 9 Am. & Eng. R. Cas. 419, 41 Am. Rep. 749, and the liability of the company as a common carrier terminates with the safe delivery of the car containing the goods

on a side track at such place.

Ordinarily, however, a carrier must have a place of its own, or access to the places of other companies, at which to discharge its freight and to take care of it for the consignees for a reasonable time. *Chicago, etc., R. Co. v. Hoyt*, 37 Ill. App. 64.

4. *Mayell v. Potter*, 2 Johns. Cas. (N. Y.) 371; *Fisk v. Newton*, 1 Den. (N. Y.) 45. Where, however, the carrier binds itself to deliver the

to remove the goods, within the time specified by the carrier, the latter is bound to store them, or place them in a safe place for the owner, or it is liable for any damage they may sustain.⁵ Usually the liability of the common carrier continues until the delivery of the goods, but a uniform and established usage of business, known to the parties, may be given in evidence, to determine when the carrier's responsibility as a common carrier terminates, as well as when it commenced.⁶ A stipulation, rule, or special contract requiring goods to be removed by the consignee within a fixed period, after which the liability of the carrier shall be that of a warehouseman only, must be reasonable, or it will not be enforced; and whether it is reasonable or not is to be determined in each case from the particular circumstances of that case.⁷ Where the carrier accepts goods with an understanding on its part that they may be left at its depot until called for, its liability is that of a warehouseman only, after the lapse of a reasonable time for the consignee to demand and receive delivery of them,⁸ and where the property is allowed to remain, after its arrival, at the depot, for the convenience solely of the consignee, the liability of the carrier is that of a warehouseman.⁹ But such agreements

goods to its own agent, it is liable if its agent deposits them in the warehouse of a third person, who by mistake delivers them to the wrong person. *Alabama, etc., R. Co. v. Kidd*, 35 Ala. 209.

5. *Cook v. Erie R. Co.*, 58 Barb. (N. Y.) 312.

6. *Stimson v. Jackson*, 58 N. H. 138; *Farmers', etc., Bank v. Champlain Transp. Co.*, 16 Vt. 52, 42 Am. Dec. 491. But no custom or practice of the carrier's servants in assisting consignees to move or unload their goods can affect the principal, after the duty of the carrier as to the delivery of the freight has ended. *Jewell v. Grand Trunk R. Co.*, 55 N. H. 84, 11 Am. Ry. Rep. 496.

7. *Louisville, etc., R. Co., v. Oden*, 80 Ala. 38; *Miller v. Marsfield*, 112 Mass. 260; *Dimick v. Milwaukee, etc., R. Co.*, 18 Wis. 471; *Collins v. Alabama, etc., R. Co.*, 104 Ala. 390, 61 Am. & Eng. R. Cas. 229; *Angle v. Mississippi, etc., R. Co.*, 9 Iowa, 487.

8. *Chapman v. Great Western R. Co.*, 42 L. T. N. S. 252. But if it deliver them to a warehouseman at the expiration of such time, it is not responsible for the negligence of the latter. *Bickford v. Metropolitan Steamship Co.*, 109 Mass. 151.

9. *Fenner v. Buffalo, etc., R. Co.*, 44 N. Y. 505; *Oderkirk v. Fargo*, 58 Hun (N. Y.), 347.

must be made with the carrier's authorized agent, or with one acting within the apparent scope of the agent's authority.¹⁰ The provisions of the charter of a railroad company or other incorporated carrier may affect its liability as warehouseman, but a provision that, upon notice to the consignee of the arrival of the goods, the carrier's liability shall, after the lapse of a reasonable time for the consignee to remove the goods, become that of a warehouseman only, is simply a statement*of the general rule which prevails in most States.¹¹ Where the bill of lading stipulated for notice of the arrival of the goods to a third person, and provided that, if the property was not removed on presentation of the bill of lading by the third person within forty-eight hours after notice, the carrier was liable as a warehouseman only, the third person, on receiving notice, must within forty-eight hours present the bill of lading if he wishes to hold the carrier as such, as after that time the carrier became a warehouseman.¹² If the defendant railroad company, in accordance with its "universal and unbroken custom," at the station to which it transported the goods, collected the freight charges from the plaintiff "on three of said shipments of freight, and then and there agreed to safely store and keep said freight in "its warehouse at that point" until such time as the same might be called for and receipted for by the petitioner," and under this arrangement "the defendant company had possession of all the" plaintiff's goods embraced in said shipment, "when the same were destroyed by fire" which consumed its warehouse, the duty which the company owed to the plaintiff relatively to such goods, was that of a warehouseman, and not that of a carrier.¹³

10. *Oderkirk v. Fargo*, 58 Hun (N. Y.) 347; *Mulligan v. Northern Pac. R. Co.*, 4 Dak. 315, 29 N. W. 659, 27 Am. & Eng. R. Cas., 33.

11. *Mills v. Michigan Cent. R. Co.*, 45 N. Y. 622, 6 Am. Rep. 152; *Michigan Cent. R. Co. v. Mineral Springs Mfg. Co.*, 16 Wall. (U. S.) 318; *Michigan Cent. R. Co. v. Lantz*, 32 Mich. 502, 8 Am. Ry. Rep. 74; *Michi-*

gan Cent. R. Co. v. Hale, 6 Mich. 243; *Michigan Cent. R. Co. v. Ward*, 2 Mich. 538.

12. *Lyons v. New York Cent., etc., R. Co.*, 136 App. Div. (N. Y.) 903, 120 N. Y. Supp. 1133, aff'g judg. 119 N. Y. Supp. 703.

13. *Kight v. Wrightsville & T. R. Co.*, 127 Ga. 204, 56 S. E. 363.

§ 16. Duty of carrier as warehouseman to store safely.

It is the duty of a carrier, after having safely transported goods to their destination, to unload them with due care and store and keep them safely in its warehouse or depot for and on account of the consignee until called for,¹⁴ or until they are, after the lapse of a reasonable time, subjected to its lien for charges.¹⁵ A railroad company is liable as a warehouseman for the security and fitness of the place in which goods shipped over its road are stored, and is required to take necessary precaution for the safety of such goods, and is also responsible for the ordinary care and attention of its servants and agents in caring for them, so that they may be delivered whenever called for.¹⁶ Where a railroad company is required by special contract to deliver goods at a particular warehouse,¹⁷ or by statute is forbidden from storing goods transported in any warehouse other than that to which it was specifically consigned, its liability as a common carrier continues until a storage in the proper warehouse.¹⁸ The obligation of a common carrier as a warehouseman is to exercise reasonable care.¹⁹

14. *Scheu v. Benedict*, 116 N. Y. 510, 15 Am. St. Rep. 426; *Cook v. Erie R. Co.*, 58 Barb. (N. Y.) 312; *Gregg v. Illinois Cent. R. Co.*, 147 Ill. 550, 37 Am. St. Rep. 238; *Cahn v. Michigan Cent. R. Co.*, 71 Ill. 96; *Chicago, etc., R. Co. v. Bensley*, 69 Ill. 630; *Rice v. Boston, etc., R. Corp.*, 98 Mass. 212; *Milwaukee, etc., R. Co. v. Fairfield*, 6 Wis. 403; *Culbreth v. Philadelphia, etc., R. Co.*, 3 *Houst. (Del.)* 392.

15. See *Carrier's Lien for Charges*, chap. 16.

16. *Grieve v. New York Cent., etc., R. Co.*, 25 App. Div. (N. Y.) 518, 49 N. Y. Supp. 949; *Sunderland v. Westcott*, 2 *Sweeny (N. Y.)* 260, 40 *How. Pr. (N. Y.)* 468; *Merchants' Dispatch, etc., Co. v. Merriam*, 111 Ind. 5, 11 N. E. 954, 31

Am. & Eng. R. Cas. 78. See also *Madan v. Covert*, 81 N. Y. 296; *Grossman v. Fargo*, 6 *Hun (N. Y.)*, 310. A common carrier is not justified in storing goods at an intermediate point, because he considers the further carriage thereof unsafe, without notice to the consignor; in such case he is liable for the neglect to carry to the place of destination. *Van Winkle v. Adams Express Co.*, 3 *Rob. (N. Y.)* 59.

17. *Moore v. Michigan Cent. R. Co.*, 3 *Mich.* 23.

18. *Chicago, etc., R. Co. v. Sawyer*, 69 Ill. 285, 18 *Am. Rep.* 613; *Vincent v. Chicago, etc., R. Co.*, 49 Ill. 33; *People v. Chicago, etc., R. Co.*, 55 Ill. 95, 8 *Am. Rep.* 631.

19. *Joerg v. Atchison, etc., Ry. Co.*, 152 Ill. App. 229.

A railroad company which has transported freight, and afterwards placed it in its warehouse, and, knowing the consignee, has given him no notice to remove it, is bound, so long as it keeps the freight, to keep it with ordinary care.²⁰ A charge requiring a carrier to keep a sufficient watch to preserve goods stored in its depot from loss by fire imposes too great a burden on the carrier, where it was only liable for the exercise of reasonable care and diligence.²¹ An instruction making it the carrier's duty to provide a "safe depository" for the goods was erroneous, as making it the carrier's duty to store the goods in a place free from any danger of any kind, whereas it was only bound to use ordinary care and prudence in providing a depository.²² A carrier was not negligent in failing to unload semi-perishable evaporated apples after notifying the consignee of their arrival at destination, in the absence of evidence that it knew, or in the exercise of reasonable diligence should have known, that the apples would have been in better condition if unloaded.²³ Where a carrier had no depot or warehouse at the place of destination for the storage of such freight as corn, it had a right to warehouse the corn in cars on side tracks.²⁴ A carrier who has carried goods for the consignor, and stored them in its warehouse subject to his order, is liable as warehouseman for a wrongful delivery.²⁵ A railroad company liable as a warehouseman for cotton left upon its station platform or yard,

20. *Lane v. Boston & A. R. Co.*, 112 Mass. 455.

21. *Louisville & N. R. Co. v. Gidley*, 119 Ala. 523, 24 So. 753; *Texas Cent. R. Co. v. Flanary*, (Tex. Civ. App.) 50 S. W. 726.

22. *Louisville & N. R. Co. v. Brownlee*, 77 Ky. (14 Bush.) 590.

23. *Becker v. Pennsylvania R. Co.*, 109 App. Div. (N. Y.) 230, 96 N. Y. Supp. 1.

A carrier does not necessarily relieve itself from all liability by giving the consignee timely notice of the

arrival of the goods, although the latter fails to remove them within a reasonable time; and it will still be liable if, after it has fully discharged its duty as a carrier, it negligently suffers the goods to be damaged or injured. *Id.*

24. *Gratiot Street Warehouse Co. v. St. Louis, etc., R. Co.*, 221 Ill. 418, 77 N. E. 675, aff'g judg. 122 Ill. App. 405.

25. *Diamond Joe Line v. Carter*, 76 Ill. App. 470.

is bound to exercise ordinary care for the prevention of fire, and to extinguish any fire which may occur.²⁶ A carrier, liable only as warehouseman, is not liable for loss of freight, unless its negligence caused the loss.²⁷ Where a carrier has become liable as warehouseman, such liability continues until it notifies the consignee that it will not insist on storage charges, from which time as a gratuitous bailee it is held only to slight care.²⁸ Even if the duty of a railroad in respect to goods was that of a warehouseman for hire, rather than a gratuitous bailee, it would not be liable for loss of the property, unless the loss was the result of its failure to exercise ordinary care for its protection, under statutes, providing that depositaries for hire are bound to exercise ordinary care and diligence, and are liable as in other cases of bailment for hire, and providing that a warehouseman is a depositary for hire and is bound only to ordinary diligence.²⁹

§ 17. Carrier's liability as warehouseman for negligence.

When a carrier has become a warehouseman as to goods by reason of a failure to remove them within a reasonable time, it is liable only for such losses or injuries as are shown to have resulted from want of ordinary and reasonable care on its part,

26. *Chicago, etc., Ry. Co. v. S. Marshall Bulley & Son*, (Tex. Civ. App.) 140 S. W. 480.

Statutory liability.—A statute, rendering railroad proprietors liable for damages to property by fire from their engines, and authorizing them to insure property, situate along the line of the road, exposed to such damage, does not impose a liability on a railroad for merchandise destroyed by fire, in its freight house, belonging to a consignee, but applies only to property in the control of others along its line. *Welch v. Concord R. Co.*, 68 N. H. 206, 44 Atl. 304.

A railroad corporation is not liable

under a statute which provides that "any railroad company operating any line in this territory shall be liable for all damages sustained by fire originating from operating their road," for goods destroyed by fire while in its possession as warehouseman or depositary. *Walker v. Eiklerberry*, 7 Okl. 599, 54 Pac. 553.

27. *Yazoo & M. V. R. Co. v. Blum*, — Miss. —, 59 So. 92.

28. *Brunson & Boatwright v. Atlantic Coast Line R. Co.*, 76 S. C. 9, 56 S. E. 538.

29. *Kight v. Wrightsville & T. R. Co.*, 127 Ga. 204, 56 S. E. 363.

and such care is measured by the care a reasonable man would take of his own property under the same circumstances, or such care as men of ordinary or reasonable prudence usually bestow on property placed in their custody and similarly situated.³⁰ In such cases ordinary or reasonable care is a relative term, being governed by the circumstances surrounding the carrier. In villages the same degree of security, either as to fire or burglary, cannot be required of a warehouseman* or a common carrier, as such, as in larger cities, where greater facilities for warehousing exist.³¹ The carrier being liable for negligence in failing to pro-

30. As to what is ordinary or reasonable care, see: *U. S.*—Farmers' L. & T. Co v. Oregon R., etc., Co., 73 Fed. 1003; *The Guiding Star*, 53 Fed. 936; *White v. Colorado Cent. R. Co.*, 3 McCrary (U. S.), 559 5 Dil. (U. S.) 428.

Ark.—*St. Louis, etc., R. Co. v. Dodd*, 59 Ark. 317; *St. Louis, etc., R. Co. v. Bone*, 52 Ark. 26.

Del.—*Culbreth v. Philadelphia, etc., R. Co.*, 3 Houst. (Del.) 392.

Ill.—*Chicago, etc., R. Co. v. Scott*, 42 Ill. 132.

Iowa.—*Leland v. Chicago, etc., R. Co. (Iowa)*, 23 N. W. 390, 21 Am. & Eng. R. Cas. 108.

Ky.—*Wald v. Louisville, etc., R. Co.*, 92 Ky. 645.

Mass.—*Aldrich v. Boston, etc., R. Co.*, 100 Mass. 31, 1 Am. Rep. 76, 97 Am. Dec. 74; *Parker v. Lombard*, 100 Mass. 405.

Md.—*Baltimore, etc., R. Co. v. Schumacher*, 29 Md. 168, 96 Am. Dec. 510.

Minn.—*Armstrong v. Chicago, etc., R. Co.*, 45 Minn. 85, 45 Am. & Eng. R. Cas. 422.

Mo.—*Levering v. Union Transp., etc., Co.*, 42 Mo. 88, 3 Am. Rep. 245,

97 Am. Dec. 320; *E. O. Standard Milling Co. v. White Line Cent. Transit Co.*, 122 Mo. 258, 61 Am. & Eng. R. Cas. 186; *Yarnell v. Kansas City, etc., R. Co.*, 113 Mo. 570; *Brennen v. St. Louis*, 92 Mo. 488, 16 Am. & Eng. Corp. Cas. 486; *Alcorn v. Chicago, etc., R. Co.*, 108 Mo. 81.

N. J.—*Morris, etc., R. Co. v. Ayres*, 29 N. J. L. 393, 80 Am. Dec. 215.

N. C.—*Turrentine v. Wilmington, etc., R. Co.*, 100 N. C. 375, 6 Am. St. Rep. 602; *Glenn v. Charlotte, etc., R. Co.*, 63 N. C. 510.

Pa.—*McCarty v. New York, etc., R. Co.*, 30 Pa. St. 247.

S. C.—*Brown v. Atlantic, etc., R. Co.*, 19 S. C. 39, 13 Am. & Eng. R. Cas. 479.

Eng.—*Searle v. Laverick*, L. R. 9 Q. B. 122; *Biblin v. McMullen*, L. R. 2 P. C. 317.

31. *Laporte v. Wells, Fargo, etc., Express*, 23 App. Div. (N. Y.) 267, 48 N. Y. Supp. 292, if there is no better or safer place, he may properly leave a box of jewelry over night in his express office, used for such purpose; *Brand v. New Jersey Steamboat Co.*, 10 Misc. Rep. (N. Y.) 128. The stipulation in a bill of lading that prop-

vide a warehouse properly and safely constructed, evidence of the character of the freight depot, the materials of which it is constructed, its liability to take fire, and facts of a similar nature are admissible.³² It is competent to show the degree of care usually exercised by warehousemen in the vicinity in similar cases,³³ but not that the goods were cared for with the same degree of care as was always bestowed upon that kind of goods at that station.³⁴ Evidence is admissible that there was not room in the freight house at the time and as to its sufficiency for the business usually done at that station, to disprove negligence in leaving goods in the open air.³⁵ In an action against a carrier to recover for goods lost by fire while stored in a warehouse, through the alleged negligence of defendant in storing them in an unsafe place, evidence is admissible showing the condition of the surrounding buildings, or that smoking in the locality had been prohibited by a city ordinance, as bearing on the issue as to such negligence.³⁶ As a warehouseman, the carrier is not liable for a loss caused by a fire wilfully started, by an employe,³⁷ or for a loss caused by an accidental fire,³⁸ or for goods stolen,³⁹ or for losses caused by the explosion of

erty not removed by the party entitled to receive it within twenty-four hours after its arrival at destination shall be at the sole risk of the owner, does not relieve the company from liability for the loss of the goods owing to its failure to exercise the care required of a warehouseman. *Aaronson v. Pennsylvania R. Co.*, 23 Misc. Rep. (N. Y.) 666, 52 N. Y. Supp. 95.

32. *Whitney v. Chicago, etc., R. Co.*, 27 Wis. 327, 5 Am. Ry. Rep. 291.

33. *Cass v. Boston, etc., R. Co.*, 96 Mass. (14 Allen) 448.

34. *Lane v. Boston, etc., R. Co.*, 112 Mass. 455.

35. *Stowe v. New York, etc., R. Co.*, 113 Mass. 521.

36. *H. C. Judd & Root v. New*

York, etc., S. Co., 130 Fed. 991.

37. *Stewart v. Gracy*, 93 Tenn. 314.

38. *Aldrich v. Boston, etc., R. Co.*, 100 Mass. 31, 1 Am. Rep. 76, 97 Am. Dec. 74; *Chapman v. Great Western R. Co.*, 28 W. R. 566; *Collins v. Alabama, etc., R. Co.*, 104 Ala. 390, 61 Am. & Eng. R. Cas. 229; *Basnight v. Atlantic, etc., R. Co.*, 111 N. C. 592.

39. *Williams v. Holland*, 22 How. Pr. (N. Y.) 137; *Lamb v. Western R. Corp.*, 7 Allen (Mass.) 98; *Neal v. Wilmington, etc., R. Co.*, 8 Jones L. (N. C.) 482; *Mote v. Chicago, etc., R. Co.*, 27 Iowa, 22, 1 Am. Rep. 212; *Finucane v. Small*, 1 Esp. N. P. 315.

packages, the contents of which are unknown to it,⁴⁰ or for loss by leakage of a defective cask,⁴¹ nor for similar losses, except upon proof that such losses resulted from a want of ordinary care on the part of the carrier and that such want of ordinary care was the proximate cause of such losses;⁴² as, for example, where the danger from fire could have been foreseen, should have been foreseen, and guarded against,⁴³ or there was a negligent omission to take reasonable and prudent precaution to guard goods in its custody from thieves.⁴⁴ The carrier, where no charge is made for the storage of goods, like other gratuitous bailees, is liable only for losses occasioned by gross negligence on its part.⁴⁵ But although there is no separate charge for storage during the reasonable time

40. *Weed v. Barney*, 45 N. Y. 344, 6 Am. Rep. 96; *White v. Colorado Cent. R. Co.*, 5 Dill. (U. S.) 428, 3 McCrary (U. S.), 559.

41. *Hudson v. Baxendale*, 2 H. & N. 575.

42. *Cailiff v. Danvers*, 1 Peake N. P. 114; *Mackenzie v. Cox*, 9 C. & P. 632, 38 E. C. L. 263.

43. *Thomas v. Lancaster Mills*. 71 Fed. 481, 34 U. S. App. 404; *Thomas v. Wabash, etc.*, R. Co., 63 Fed. 200, 61 Am. & Eng. R. Cas. 206, note; *St. Louis, etc., R. Co. v. Dodd*, 59 Ark. 317, 61 Am. and Eng. R. Cas. 247.

The fact that a carrier which placed goods received for shipment in its warehouse took adequate precautions against fire on its own premises does not exonerate it from liability as a matter of law for the destruction of the goods from a fire originating on adjoining premises which it did not own or control, although such fire was so violent that it was impossible to prevent it from spreading to its own building, where

it has full knowledge of the manifest danger to its own premises arising from the specially hazardous condition of those adjoining, and took no means to guard against it. Under such circumstances, it may have been culpable negligence, and a breach of duty as a bailee for hire, to place the goods in such warehouse. *Judd v. New York, etc., S. Co.*, 117 Fed. 206, 54 C. C. A. 238, rehearing granted, 118 Fed. 826, 55 C. C. A. 438, aff'd 128 Fed. 7, 62 C. C. A. 515.

44. *Faucett v. Nichols*, 64 N. Y. 377.

45. *Treleven v. Northern Pac. R. Co.*, 89 Wis. 598; *McCombs v. North Carolina, etc., R. Co.*, 67 N. C. 193; *Smith v. Nashua, etc., R. Co.*, 27 N. H. 86, 59 Am. Dec. 364; *Michigan Southern, etc., R. Co. v. Shurtz*, 7 Mich. 515; *Hapgood Plow Co. v. Wabash R. Co.*, 61 Mo. App. 372, 1 Mo. App. Rep. 637; *Brown v. Grand Trunk R. Co.*, 54 N. H. 535, 11 Am. Ry. Rep. 195; *Angle v. Mississippi, etc., R. Co.*, 18 Iowa, 555.

after the arrival of the goods in which the consignee may call for and take them away, yet the freight to be paid, fixed by the carrier as a compensation for the whole service, is paid as well for the temporary storage as for the carriage, and such temporary storage is, therefore, not gratuitous.⁴⁶ The carrier has a right, in the absence of an agreement to perform the entire service for a stipulated sum, to make a separate charge for storage,⁴⁷ although in some jurisdictions it is held that the consignee is entitled to have his goods remain in the depot a reasonable time in which to arrange for removing them, and no storage can be charged until after the lapse of such time.⁴⁸ Where the carrier charges for storage, its liability is that of a bailee for hire and it is bound to the exercise of ordinary care for the safety of the goods in its charge.⁴⁹ The burden of proof is on the consignee or owner of the goods to prove negligence or the want of ordinary care in the custody of the goods on the part of the carrier, where the loss of goods has occurred while the carrier held the goods as warehouseman, as, for example, where the goods have been shown to have been stolen or destroyed by fire.⁵⁰ But the failure of the carrier

46. *Norway Plains Co. v. Boston, etc.*, R. Co., 1 Gray (Mass.), 272, 61 Am. Dec. 423; *Mobile, etc., R. Co. v. Prewitt*, 46 Ala. 63, 7 Am. Rep. 586; *Western, etc., R. Co. v. Camp*, 53 Ga. 596; *Brown v. Grand Trunk R. Co.*, 54 N. H. 535; *Mitchell v. Lancashire, etc., R. Co.*, L. R. 10 Q. B. 256; *Cairus v. Robins*, 8 M. & W. 258; *White v. Humphrey*, 11 Q. B. 43, 63 E. C. L. 43.

47. *Hurd v. Hartford, etc., Steamboat Co.*, 40 Conn. 48; *Illinois Cent. R. Co. v. Alexander*, 20 Ill. 23; *Rome R. Co. v. Sullivan*, 14 Ga. 277; *Miller v. Mansfield*, 112 Mass. 260; *Dimmick v. Milwaukee, etc., R. Co.*, 18 Wis. 471.

48. *Bansemmer v. Toledo, etc., R. Co.*,

25 Ind. 434, 87 Am. Dec. 367; *Morris, etc., R. Co. v. Ayres*, 29 N. J. L. 393, 80 Am. Dec. 215; *Brown v. Grand Trunk R. Co.*, 54 N. H. 535, 11 Am. Ry. Rep. 195.

49. *Burroughs v. Grand Trunk R. Co.*, 67 Mich. 351, 34 N. W. 875.

50. *Claffin v. Meyer*, 75 N. Y. 260; *Jackson v. Sacramento Valley R. Co.*, 23 Cal. 269; *National Line Steamship Co. v. Smart*, 107 Pa. St. 492; *E. O. Stannard Milling Co. v. White Line Cent. Trans. Co.*, 122 Mo. 258; *Denton v. Chicago, etc., R. Co.*, 52 Iowa, 161, 35 Am. Rep. 263; *Texas, etc., R. Co. v. Weaver*, 3 Tex. App. Civ. Cas. § 60; *Louisville, etc., R. Co. v. Manchester Mills*, 88 Tenn. 653. Compare *Almand v. Georgia R., etc., Co.*, 95

to deliver, upon demand, goods held by it as warehouseman, casts upon it the burden of accounting for them and showing that the goods have been lost without any negligence on its part.⁵¹ A carrier of goods holding them as a warehouseman is responsible for damages to them attributable to its negligence.⁵² In the absence of a showing of negligence, a railroad company is not liable as warehouseman for goods left in a car under an agreement for payment of demurrage.⁵³ A shipper who at the invitation of a railroad company left upon the company's station platform part of a lot of cotton intended for shipment for which the railroad company was liable as warehouseman, was not guilty of contributory negligence, though the cotton was burned.⁵⁴ A carrier's responsibility as a warehouseman having attached, it is still liable for giving incorrect information misleading the consignee so as to prevent removal before the goods are lost, though the loss is not imputable to any other or different negligence.⁵⁵ Where the buyer of certain grain shipped by rail refused to receive it, and the railroad company requested the parties in interest to direct the disposition of the grain, which they refused to do, and, there being no proper storage facilities at the place to which the grain was consigned, the railroad took it to another town, fourteen miles away, where it was properly stored, the railroad company was not liable for damages to the grain caused by an unprecedented storm.⁵⁶

§ 18. Statute making railroad company liable for losses by fire.

A statute making a railroad company liable for property burned

Ga. 775; *Missouri Pac. Ry. Co. v. Texas, etc., R. Co.*, 33 Fed. 361.

51. *Schwerin v. McKie*, 51 N. Y. 180; *Bank of Oswego v. Doyle*, 91 N. Y. 42; *Williamson v. New York, etc., R. Co.*, 56 N. Y. Super. Ct. 508, 4 N. Y. Supp. 834; *Brown v. Atlantic, etc., R. Co.*, 19 S. C. 39, 13 Am. & Eng. R. Cas. 479.

52. *Bobbink v. Erie R. Co.*, 82 N. J. L. (53 Vroom) 547, 82 Atl. 877.

53. *Texas & P. R. Co. v. Robertson* (Tex. Civ. App.), 143 S. W. 708.

54. *Chicago, etc., R. Co. v. S. Marshall Bulley & Son* (Tex. Civ. App.), 140 S. W. 480.

55. *Southern Ry. Co. v. W. T. Adams Mach. Co.*, 165 Ala. 436, 51 So. 779.

56. *Gulf, etc., R. Co. v. North Texas Grain Co.*, 32 Tex. Civ. App. 93, 74 S. W. 567.

by fire communicated by its engines does not apply where the goods burned were in the custody of the company as a warehouseman;⁵⁷ but it does apply where the goods were in a storehouse owned by the company, but used exclusively by the consignee, neither the relation of carrier nor warehouseman existing at the time of the fire.⁵⁸

§ 19. Proximate cause of loss.

Where a railroad company holding property in its warehouse as a bailee for hire allowed a car marked "Powder," which was in fact empty, but locked, to be placed in close proximity thereto, and the warehouse caught fire, and the property was destroyed solely because the firemen was prevented, through reasonable fear of the powder car, from extinguishing the fire, the company was liable for the loss.⁵⁹ Where goods are placed by a carrier in its warehouse, and the consignee inquires for them a number of times, but is told each time they are not there, the carrier is liable as a warehouseman for their destruction by fire, notwithstanding the fire may have occurred without any negligence on its part, as the failure to deliver was the proximate cause.⁶⁰ When grain stored in a carrier's elevator is destroyed by a fire not caused by its negligence, its delay in not removing the grain as speedily as it should have done does not render it liable for the loss; the fire, and not the delay, being the proximate cause of the loss.⁶¹ Where barrels containing oil were carelessly handled by the employe of defendant, and, while leaking, were delivered to another carrier in an

57. *Bassett v. Connecticut River R. Co.*, 145 Mass. 129, 13 N. E. 370, 1 Am. St. Rep. 443, 32 Am. & Eng. R. Cas. 528.

58. *Blaisdell v. Connecticut River R. Co.*, 145 Mass. 132, 13 N. E. 373, 32 Am. & Eng. R. Cas. 530, note.

59. *Hardman v. Montana Union Ry. Co.*, 83 Fed. 88, 27 C. C. A. 407, 39 L. R. A. 390.

60. *East Tennessee, etc., Ry. Co. v. Kelly*, 91 Tenn. 699, 20 S. W. 312, 17 L. R. A. 691; *Id.* 91 Tenn. 708, 20 S. W. 314, 17 L. R. A. 691, following *Deming v. Merchants' Cotton-Press & Storage Co.*, 90 Tenn. 306, 17 S. W. 89.

61. *Davis v. Central Vermont R. Co.*, 66 Vt. 290, 29 Atl. 313, 45 Am. Rep. 590.

adjoining warehouse, where, through negligence of the other carrier, the oil took fire, and both warehouses were consumed, the first carrier was not liable for the destruction of the goods stored with it, under a bill of lading exempting defendant from liability by fire, since defendant's negligence was not the proximate cause of the loss.⁶²

62. *McMillan v. Michigan Southern, etc., R. Co.*, 16 Mich. 79, 93 Am. Dec. 208.

CHAPTER X.

LIMITATION OF LIABILITY.

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§ 1. Limitation of carrier's liability generally.

A common carrier may, by a just and reasonable contract, limit the extent of its common law liability in case of loss or injury. This may be done by special or express contracts or to a limited extent by contracts implied from public notice. This is almost universally held to be the rule by the United States Courts, the courts of England and Canada, and the courts of the States, except a few States where by constitutional provision or statute such limitation is prohibited. But the rule is equally as well settled and almost as universally maintained that the carrier cannot contract to relieve itself from liability for loss or injury which is the result of its own negligence or that of its servants.¹

1. *U. S.*—New York Cent. R. Co. v. Lockwood, 17 Wall. (U. S.) 357; New Jersey Steam Transp. Co. v. Merchants' Bank, 6 How. (U. S.) 344; Bank of Kentucky v. Adams Express Co., 93 U. S. 174; Muser v. Holland, 17 Blatchf. (U. S.) 412; Grand Trunk R. Co. v. Stevens, 95 U. S. 655; Ogdensburgh, etc., R. Co. v. Pratt, 22 Wall. (U. S.) 123.

Ala.—Mobile, etc., R. Co. v. Hopkins, 41 Ala. 486, 94 Am. Dec. 607; Southern Express Co. v. Crook, 44 Ala. 468, 4 Am. Rep. 140; South, etc., Alabama R. Co. v. Henlein, 52 Ala. 606, 56 Ala. 368; Grey v. Mobile, etc., Trade Co., 55 Ala. 387, 28 Am. Rep. 729.

Ark.—Taylor v. Little Rock, etc., R. Co., 32 Ark. 398, 29 Am. Rep. 1, 39 Ark. 148, 18 Am. & Eng. R. Cas. 590; Little Rock, etc., R. Co. v. Tal-

bot, 39 Ark. 523, 18 Am. & Eng. R. Cas. 598, 47 Ark. 97.

Colo.—Western Union Tel. Co. v. Graham, 1 Colo. 230, 9 Am. Rep. 136; Merchants' Dispatch, etc., Co. v. Cornforth, 3 Colo. 280, 25 Am. Rep. 757.

Conn.—Camp v. Hartford, etc., Steamboat Co., 43 Conn. 333; Welch v. Boston, etc., R. Co., 41 Conn. 333, 6 Am. Ry. Rep. 95; Hale v. New Jersey Steam Nav. Co., 15 Conn. 539, 39 Am. Dec. 398.

Ga.—Southern Express Co. v. Barnes, 36 Ga. 532; Purcell v. Southern Express Co., 34 Ga. 315.

Ill.—Black v. Wabash, etc., R. Co., 111 Ill. 351, 53 Am. Rep. 628, 25 Am. & Eng. R. Cas. 388; Wabash, etc., R. Co. v. Peyton, 106 Ill. 354, 46 Am. Rep. 705, 18 Am. & Eng. R. Cas. 1.

Ind.—Lake Erie, etc., R. Co. v. Holland (Ind.), 69 N. E. 138, 63 L.

§ 2. Operation and effect of limitation in general.

Freeing itself by contract from its usual common-law duties does not change the true character of a carrier's employment, and it is a public carrier still.² Where a common carrier, accepting property for transportation, commits a breach of its common-law duties, the shipper may maintain an action in tort therefor, though the carrier receives the property under a special contract limiting its liability; the carrier in accepting the shipment accepting it with

R. A. 948; *Bartlett v. Pittsburgh, etc., R. Co.*, 94 Ind. 281, 18 Am. & Eng. R. Cas. 549.

Iowa.—*McCoy v. Keokuk, etc., R. Co.*, 44 Iowa, 424.

Kan.—*Kansas Pac. R. Co. v. Reynolds*, 17 Kans. 251.

Ky.—*Rhodes v. Louisville, etc., R. Co.*, 9 Bush (Ky.), 688.

La.—*Simon v. Steamship Fung Shuey*, 21 La. Ann. 363.

Me.—*Morse v. Canadian Pac. R. Co.*, 97 Me. 77, 53 Atl. 874; *Willis v. Grand Trunk R. Co.*, 62 Me. 488.

Mass.—*Buckland v. Adams Express Co.*, 97 Mass. 124, 93 Am. Dec. 68.

Minn.—*O'Malley v. Great Northern R. Co.*, 86 Minn. 580, 90 N. W. 974; *Jacobus v. St. Paul, etc., R. Co.*, 20 Minn. 125, 18 Am. Rep. 360, 1 Cent. L. J. 375.

Miss.—*Mobile, etc., R. Co. v. Weiner*, 49 Miss. 725.

Mo.—*Oxley v. St. Louis, etc., R. Co.*, 65 Mo. 629.

Neb.—*Atchison, etc., R. Co. v. Washburn*, 5 Neb. 117.

N. H.—*Hall v. Cheney*, 36 N. H. 26.

N. J.—*Taylor v. Pennsylvania R. Co.*, 8 N. J. L. J. 149; *Paul v. Pennsylvania R. Co.*, 70 N. J. Law 442, 57 Atl. 139; *Ashmore v. Pennsylvania Steam Towing, etc., Co.*, 28 N. J. L. 180.

N. C.—*Parker v. Atlantic, etc., R. Co.*, 133 N. C. 335, 63 L. R. A. 827, 45 S. E. 658; *Lee v. Raleigh, etc., R. Co.*, 72 N. C. 236.

Ohio.—*Pennsylvania Co. v. Yoder*, 25 Ohio C. C. R. 32; *Erie R. Co. v. Lockwood*, 28 Ohio St. 358; *Gaines v. Union Transp., etc., Co.*, 28 Ohio St., 428, 14 Am. Ry. Rep. 158; *Cincinnati, etc., R. Co. v. Berdan*, 22 Ohio Cir. Ct. R. 326.

Pa.—*Farnham v. Camden, etc., R. Co.*, 55 Pa. St. 53.

S. C.—*Levy v. Southern Express Co.*, 4 S. C. 234.

Tenn.—*Dillard v. Louisville, etc., R. Co.*, 2 Lea (Tenn.), 288.

Tex.—*Galveston, etc., R. Co. v. Allison*, 59 Tex. 193, 12 Am. & Eng. R. Cas. 28.

Vt.—*Kimball v. Rutland, etc., R. Co.*, 26 Vt. 247, 62 Am. Dec. 567.

Va.—*Wilson v. Chesapeake, etc., R. Co.*, 21 Gratt. (Va.) 654.

W. Va.—*Brown v. Adams Express Co.*, 15 W. Va. 812.

Wis.—*Detroit, etc., R. Co. v. Farmers', etc., Bank*, 20 Wis. 122.

Eng.—*Peek v. North Staffordshire R. Co.*, 10 H. L. Cas. 473, 32 L. J. Q. B. 241.

2. *Lake Erie, etc., R. Co. v. Holland*, 162 Ind. 406, 69 N. E. 138, 63 L. R. A. 948.

the obligations imposed by law, and the special contract merely constituting a defense in so far as the exemptions from liability which it creates are valid.³ Under a contract of shipment providing that no carrier is bound to carry the property by a particular train or vessel, or otherwise than with as reasonable dispatch as its general business will permit, or shall be liable for loss thereof by fire, the carrier is not liable, where the fire destroying the vessel and cargo did not arise from its fault, though the goods would not have been destroyed if it had carried them on the night of their arrival; the capacity of the vessel not being sufficient for all the cargo.⁴ So, where a bill of lading provided that goods should be delivered to successive carriers, and that no carrier should be liable for loss or damage after said goods were ready for delivery to the next carrier, and a railroad company transported the goods to a seaport with proper diligence, and deposited them in the railroad company's warehouse ready for shipment when the boats of the connecting carrier should arrive, the connecting carrier having no warehouse or dock, and while the goods were awaiting transportation, they were destroyed by fire, not caused by defendant's negligence, the railroad company was not liable.⁵ The rule of law that stipulations varying or limiting the liability of the common carrier must be strictly construed against the carrier has reference to the question of the extent of the liability of the carrier during the period in which he is acting in such capacity, and does not have reference to the question of when the liability of a common carrier ceases by the delivery of the property to the consignee.⁶ Appropriate language being used in a bill of lading, liquidating, on a value basis, recoverable damages for the loss of or injury to the subject of carriage happening through events described by such language as to reasonably include results of negligence on the part of the carrier,

3. *Nelson v. Great Northern R. Co.*, 28 Mont. 297, 72 Pac. 642.

4. *The Nutmeg State*, 103 Fed. 797.

5. *Courteen v. Kanawha Dispatch*, 110 Wis. 610, 86 N. W. 176.

6. *Paddock v. Toledo, etc., R. Co.*, 21 Ohio C. C. R. 626, 11 O. C. D. 789.

and also appropriate language exempting the carrier from liability in consideration of a special freight rate or other valuable consideration, for loss of or damage to such subject, by events not necessarily attributable to the carrier's negligence, the reasonable construction is that the limitation of liability on a value basis refers to loss by negligence, and that the entire exemption from liability refers to damages caused by such mere accidents as the carrier would be liable for, and that neither refers to occurrences for which there would be no liability whatever, nor to damages, caused by willful misfeasance.⁷ Contracts or agreements or bills of lading creating special limitation of the liability of a carrier or which tend to limit its common-law liability for its own defaults should be strictly construed against the carrier, even when valid,⁸ and the same rule applies as to a release against accrued

7. *Ullman v. Chicago, etc., R. Co.*, 112 Wis. 168, 88 N. W. 41, 88 Am. St. Rep. 949. The words "in case of accident" being used in a bill of lading, referring to events involving damage to the subject of carriage for which the carrier would be liable, and later in the contract the words "negligence aforesaid" being used in regard to the producing cause of injuries to the subject of carriage, without any precedent language other than the words "in case of accident" to which such words can reasonably refer, leaving such latter expression without significance except by reference to the former expression, such latter expression should be taken as pointing to the former under the rule for judicial construction that every word or expression in a contract should be given some significance if that can reasonably be done. *Id.*

8. *Ala.*—*St. Louis & S. F. R. Co. v. Cavender*, 170 Ala. 601, 54 So. 54;

Central of Ga. Ry. Co. v. A. F. Merrill & Co., 153 Ala. 277, 45 So. 628, holding also that the word "carrier" in a bill of lading should be taken as referring not merely to the transportative capacity of the company, but to the contracting entity in its dual capacity of common carrier and warehouseman.

Colo.—*Estes v. Denver & R. G. R. Co.*, 49 Colo. 378, 113 Pac. 1005.

N. Y.—*Hoye v. Pennsylvania R. Co.*, 191 N. Y. 101, 83 N. E. 586, affg. judg. 100 N. Y. Supp. 190, 1121; *Carleton v. Union Trans., etc., Co.*, 121 N. Y. Supp. 997, 137 App. Div. 225, affg. judg. 117 N. Y. Supp. 1021, 164 Misc. Rep. 51; *Galloway v. Erie R. Co.*, 102 N. Y. Supp. 25, 116 App. Div. 777, provisions, where equivocal, are to be construed against the carrier.

S. C.—*Gilliland & Gaffney v. Southern Ry. Co.*, 85 S. C. 26, 67 S. E. 20.

damages.⁹ The mere fact of the destruction of property by a flood will not justify a railroad company to which the property has been intrusted, in failing to exercise reasonable care and diligence in order to save it from injury, although the bill of lading under which the property was shipped provided that the carrier should not be liable for any loss caused by floods; and this duty is a continuing one as long as the loss is voidable, and this, independent of the notice to be given to the consignee of the arrival of the freight.¹⁰ A clause in a bill of lading exempting the carrier from liability for loss or damage caused by fire does not relieve it from liability for negligence.¹¹ A clause in a bill of lading, providing that no carrier or party in possession of all or any of the property shall be liable for any loss thereof or damage thereto by fire, was applicable only in case the carrier at the time of the fire which destroyed the goods was "in possession" thereof.¹² Where the bill of lading under which a car of lumber was shipped relieved the carrier from liability for damage by fire unless resulting directly from the carrier's negligence, and the carrier, before moving the car, allowed it to remain for two days on a side track near a sawmill, and the lumber was destroyed by fire originating in the mill, the carrier was liable for the loss.¹³ A clause in a bill of lading, exempting the carrier from liability for loss "by floods or by fire," limits liability to negligence.¹⁴ Where several receipts containing limitations of the carrier's liability were given for property consigned, each receipt constituted a special contract for the transportation of the property named therein, so that a limitation of liability in a receipt only applied to the property described therein.¹⁵ The term "released," as a legal phrase, and

9. *St. Louis & S. F. R. Co. v. Cavender*, *supra*.

10. *Cunningham v. Pennsylvania R. Co.*, 50 Pa. Super. Ct. 609.

11. *Bobbink v. Erie R. Co.*, 82 N. J. Law 547, 82 Atl. 877.

12. *Bolles v. Lehigh Valley R. Co.*, 159 Fed. 694, 86 C. C. A. 562.

13. *Arkansas Southern R. Co. v. Murphy*, 83 Ark. 562, 103 S. W. 743.

14. *Burke v. Erie R. Co.*, 119 N. Y. Supp. 309, 134 App. Div. 413.

15. *Rappaport v. White's Express Co.*, 131 N. Y. Supp. 131, 146 App. Div. 576.

when used in reference to a shipment by a carrier, means that the carrier is relieved from losses not occasioned by its negligence.¹⁶ The acceptance of a bill of lading, stipulating that no carrier or party in possession of property should be liable for loss or damage by causes beyond its control or by flood or fire, relieved the carrier from an insurer's liability, with familiar exceptions, and limited liability to loss or damage by negligence of the carrier.¹⁷ Clauses in a bill of lading, exempting the carrier from liability for delay in transportation arising from specified causes, did not relieve it, when delay occurred, from the obligation which it assumed to re-ice a refrigerator car from point of shipment to destination.¹⁸ The provisions of a bill of lading limiting the carrier's common-law liability will not be considered conditions precedent to a right to recover, unless it clearly appears that such was the intent, or it is so specifically stated.¹⁹ Deviation by a carrier from the route described in the contract of shipment makes him liable as an insurer of the goods shipped, though the contract of shipment exempts him from liability under the circumstances under which the goods were actually injured.²⁰ A shipping contract stipulating that in consideration of a reduced rate the shipper releases the carrier for breach of any contract to furnish cars at any particular time releases a claim for damages for failure to furnish cars at a time agreed upon, which damages had accrued when the contract was signed.²¹ The exemptions and restrictions stipulated for in a contract of carriage do not relieve the carrier from liability for the consequences of its own negligence.²² A carrier is liable for a loss occasioned by ordinary negligence, notwithstanding a waiver

16. *Central of Ga. Ry. Co. v. Butler Marble & Granite Co.*, 8 Ga. App. 1, 68 S. E. 775.

17. *Central of Ga. Ry. Co. v. Burton*, 165 Ala. 425, 51 So. 643.

18. *Geraty v. Atlantic Coast Line R. Co.*, 81 S. C. 367, 62 S. E. 444.

19. *Hoye v. Pennsylvania R. Co.*,

191 N. Y. 101, 83 N. E. 586, aff'g judg. 100 N. Y. Supp. 190, 1121.

20. *McKahan v. American Express Co.*, 209 Mass. 270, 95 N. E. 785.

21. *Freeman v. St. Louis & S. F. R. Co.*, 138 Mo. App. 322, 122 S. W. 1.

22. *Hahn v. St. Louis, etc., R. Co.*, 141 Mo. App. 453, 125 S. W. 1185.

in a bill of lading purporting to exempt it from liability.²³ A contract between a railway company and a construction company for reduced rate for transportation of camp outfit and supplies required in grading an extension was held to exempt the railroad from all liability for loss during the transportation whether attributable to its negligence or not.²⁴ It is only when the contract is repudiated by the carrier that the limitation as to the value of the goods is abrogated.²⁵ Where a shipper had bulk corn, which was shipped in a stock car, sacked en route without removing it from the car, and redelivered it for transportation under a bill of lading providing that damage on account of being loaded in a stock car was at the owner's risk, the carrier was not liable for damages to the corn by it being loaded in the stock car.²⁶ Proof that brine had run off fish shipped in barrels, and that the barrels during transportation had been punctured, and that the fish were injured thereby, did not prove a leakage within the bill of lading, relieving the carrier from liability for damages caused by leakage.²⁷

§ 3. Limitation by public notice.

The authorities generally hold that a common carrier can only restrict or limit its common law liability and discharge itself from duties which the law has annexed to its employment by express contract, and not by a general notice, although brought home to the owner of the goods.²⁸ But the carrier may by a general notice

23. *National Rice Milling Co. v. New Orleans & N. E. R. Co.*, 132 La. 615, 61 So. 708.

24. *Santa Fe, etc., R. Co. v. Grant Bros. Const. Co.*, 228 U. S. 177, 33 Sup. Ct. 474, 57 L. Ed. 1.

25. *Coleman v. New York, etc., R. Co.*, Mass. —, 102 N. E. 92.

26. *Nicholson v. St. Louis & S. F. R. Co.*, 141 Mo. App. 199, 124 S. W. 573.

27. *A. C. L. Haase & Sons Fish Co.*,

v. Merchants' Despatch Transp. Co., 143 Mo. App. 42, 122 S. W. 362.

28. *Hollister v. Nowlen*, 19 Wend. (N. Y.) 234; *Cole v. Goodwin*, 19 Wend. (N. Y.) 251; *Clerk v. Faxton*, 21 Wend. (N. Y.) 153; *Dorr v. New Jersey Steam Nav. Co.*, 11 N. Y. 485, 4 Sand. (N. Y.) 136; *Fibel v. Livingston*, 64 Barb. (N. Y.) 179; *Freeman v. Newton*, 3 E. D. Sm. (N. Y.) 246; *Judson v. Western R. Corp.*, 6 Allen (Mass.), 486, 490, 93 Am.

publicly posted, but not shown to have been brought to the shipper's attention before shipment, require all shippers to state the true nature or value of the property shipped, with a view to the amount of compensation for the services and risk, or else the carrier will be absolved from the consequences of a loss, not occasioned by negligence or misconduct, beyond the apparent value of such property.²⁹ It is the generally accepted doctrine that the carrier may limit its liability by public notice of a reasonable rule or regulation as to the manner of entry or consignment of goods, the statement of their value and character, and as to its own charges.³⁰ Such a rule or regulation in respect to duties designed simply to insure good faith and fair dealing is held to be one of which the shipper must inform himself if reasonable opportunity therefor be given him, and he will be bound by it whether it is specifically brought to his attention or not. A general notice publicly posted is sufficient to discharge the carrier.³¹ In New

Dec. 646; Illinois Cent. R. Co. v. Frankensburg, 54 Ill. 88; Davidson v. Graham, 2 Ohio St. 131; Brown v. Adams Express Co., 15 W. Va. 812; McMillan v. Michigan, etc., R. Co., 6 Mich. 79, 111; Gott v. Dinsmore, 111 Mass. 45; Fillebrown v. Grand Trunk R. Co., 55 Me. 462, 92 Am. Rep. 606.

29. McMillan v. Michigan Southern, etc., R. Co., 16 Mich. 79, 93 Am. Dec. 208; Western Transp. Co. v. Newhall, 24 Ill. 466, 76 Am. Dec. 760; Farmers', etc., Bank v. Champlain Transp. Co., 16 Vt. 52, 18 Vt. 131, 23 Vt. 186, 56 Am. Dec. 68; Adams Express Co. v. Stettaners, 61 Ill. 184, 14 Am. Rep. 57; Oppenheimer v. United States Express Co., 69 Ill. 62, 18 Am. Rep. 596; Southern Express Co. v. Newby, 36 Ga. 635, 91 Am. Dec. 783.

30. New Jersey Steam Nav. Co. v. Merchants' Bank, 6 How. (U. S.)

344; Hopkins v. Westcott, 6 Blatchf. (U. S.) 64; Lawrence v. New York, etc., R. Co., 36 Conn. 63; Kallman v. United States Express Co., 3 Kan. 205; Brehme v. Dinsmore, 25 Md. 328; Judson v. Western R. Corp., 6 Allen (Mass.), 486, 83 Am. Dec. 646; McMillan v. Michigan Southern, etc., R. Co., 16 Mich. 79, 93 Am. Dec. 208; Snider v. Adams Express Co., 63 Mo. 376; Ketchum v. American M. U. Express Co., 52 Mo. 390; Moses v. Boston, etc., R. Co., 24 N. H. 71, 55 Am. Dec. 222; Fibel v. Livingston, 64 Barb. (N. Y.) 179; Farmer's, etc., Bank v. Champlain Transp. Co., 23 Vt. 186, 56 Am. Dec. 68; Boorman v. American Express Co., 21 Wis. 152.

31. Erie R. Co. v. Wilcox, 84 Ill. 239, 25 Am. Rep. 451, 16 Am. Ry. Rep. 457; Oppenheimer v. United States Express Co., 69 Ill. 62, 18 Am. Rep. 596.

York, however, the rule is that mere public notice will not operate as a limitation of the carrier's liability unless brought home to the owner of the goods.³² But except for the establishment of such rules or regulations to insure regularity and promptness and properly inform the carrier of the responsibility he assumes, the force of a mere notice cannot extend, and the general doctrine maintained by the courts of the United States, as well as in England and Canada, is that a carrier cannot limit its liability by any public notice unless such notice is shown to have been brought to the knowledge or attention of the shipper within a reasonable time before shipment and to have been expressly assented to by him, or his agent.³³ There are cases in some of the States, how-

The language of the publication must be plain, explicit and unambiguous, if the carrier relies on a mere notice or advertisement as a limitation of its liability. *Beckman v. Shouse*, 5 Rawle (Pa.), 179, 28 Am. Dec. 653; *Barney v. Prentiss*, 4 Har. & J. (Md.) 317, 7 Am. Dec. 670.

32. *Hollister v. Nowlen*, 19 Wend. (N. Y.) 234, 32 Am. Dec. 455; *Cole v. Goodwin*, 19 Wend. (N. Y.) 251, 32 Am. Dec. 470.

33. See cases cited note 32, *supra*.
N. Y.—*Springer v. Westcott*, 166 N. Y. 117, 59 N. E. 693; *Rawson v. Pennsylvania R. Co.*, 48 N. Y. 212, 8 Am. Rep. 543; *Blossom v. Dodd*, 43 N. Y. 264, 3 Am. Rep. 701; *Camden etc., R. Co. v. Belknap*, 21 Wend. (N. Y.) 354; *Zimmer v. New York Cent., etc., R. Co.*, 137 N. Y. 462; *Grossman v. Dodd*, 63 Hun (N. Y.), 324, *affd.* 137 N. Y. 599; *Madan v. Sherard*, 73 N. Y. 329, 29 Am. Rep. 153; *Reed v. Fargo*, 7 N. Y. Supp. 185.

Where an express company gave plaintiff a receipt for a trunk check which contained a provision limiting

the company's liability, plaintiff was not bound thereby, when she had no knowledge of the contents of the paper, and there was no showing that it was proffered as a contract, or that plaintiff accepted it as anything more than a means to identify her property. *Walker v. Platt*, 34 Misc. Rep. (N. Y.) 799, 69 N. Y. Supp. 943.

U. S.—*New Jersey Steam Nav. Co. v. Merchants' Bank*, 6 How. (U. S.) 344; *Ormsby v. Union Pac. R. Co.*, 4 Fed. 706, 2 McCrary (U. S.), 48; *Michigan Cent. R. Co. v. Mineral Springs Mfg. Co.*, 16 Wall. (U. S.) 318; *Ayres v. Western R. Corp.*, 14 Blatchf. (U. S.) 9; *The Brig May Queen*, 1 Newb. Adm. 465; *The Pacific, Deady* (U. S.), 17.

Ala.—*Southern Express Co. v. Armstead*, 50 Ala. 350; *Southern Express Co. v. Crook*, 44 Ala. 468; 4 Am. Rep. 140; *Southern Express Co. v. Caperton*, 44 Ala. 101, 4 Am. Rep. 118; *Mobile, etc., R. Co. v. Jarboe*, 41 Ala. 644; *Steele v. Townsend*, 37 Ala. 247, 79 Am. Dec. 49.

Conn.—*Peck v. Weeks*, 34 Conn.

ever, which hold that while a general or published notice is insufficient for a contract limiting liability to be implied therefrom,

145; *Derwot v. Loomer*, 21 Conn. 245; *Hale v. New Jersey Steam Nav. Co.*, 15 Conn. 539, 39 Am. Dec. 398. See *Coupland v. Housatonic R. Co.*, 61 Conn. 531, 55 Am. & Eng. R. Cas. 380.

Ga.—*Georgia R. Co. v. Gann*, 68 Ga. 350. A common carrier of goods cannot limit his legal liability as an insurer, except by an express contract entered into by both parties. *Central of Georgia R. Co. v. Lippman*, 110 Ga. 665, 36 S. E. 202.

Ill.—*Oppenheimer v. United States Express Co.*, 69 Ill. 62, 18 Am. Rep. 596; *Illinois Cent. R. Co. v. Frankenberg*, 54 Ill. 88, 5 Am. Rep. 92; *Western Transp. Co. v. Newhall*, 24 Ill., 466, 76 Am. Dec. 760; *Chicago etc., R. Co. v. Harmon*, 12 Ill. App. 54. There must be clear proof that the shipper expressly assented to limitations on the carrier's liability contained in its contract, or the shipper, notwithstanding notice of such intended limitation, may insist that the carrier shall transport his goods incident to the common-law employment. *Adams Exp. Co. v. Bratton*, 106 Ill. App. 563.

Ind.—*Indianapolis, etc., R. Co. v. Cox*, 29 Ind. 360, 95 Am. Dec. 640; *Evansville, etc., R. Co. v. Young*, 28 Ind. 516.

La.—*New Orleans Mut. Ins. Co. v. New Orleans, etc., R. Co.*, 29 La. Ann. 302; *Roberts v. Riley*, 15 La. Ann. 103, 77 Am. Dec. 183; *Logan v. Pontchartrain R. Co.*, 11 Rob. (La.) 24, 43 Am. Dec. 199; *Baldwin v. Collins*, 9 Rob. (La.) 468.

Md.—*Baltimore, etc., R. Co. v. Brady*, 32 Md. 333.

Mass.—*Buckland v. Adams Express Co.*, 97 Mass. 131, 93 Am. Dec. 68; *Judson v. Western R. Corp.*, 6 Allen (Mass.) 490.

Mich.—*McMillan v. Michigan Southern, etc., R. Co.*, 16 Mich. 79, 93 Am. 208; *American Transp. Co. v. Moore*, 5 Mich. 368.

Miss.—*Mobile, etc., R. Co. v. Weiner*, 49 Miss. 725.

Neb.—*Atchison, etc., R. Co. v. Miller*, 16 Neb. 661, 18 Am. & Eng. R. Cas. 545.

N. C.—*Gardner v. Southern R. Co.*, 127 N. C. 293, 37 N. E. 328.

N. H.—*Moses v. Boston, etc., R. Co.*, 24 N. H. 71, 55 Am. Dec. 222; *Bennett v. Dutton*, 10 N. H. 481.

N. J.—*Gibbons v. Wade*, 8 N. J. L. 255.

Ohio.—*Mack v. Great Western Despatch*, 2 O. C. D. 22, the acceptance of dray tickets did not constitute an assent to their terms; *Gaines v. Union Transp., etc., Co.*, 28 Ohio St. 418; *Jones v. Voorhees*, 10 Ohio 145; *Davidson v. Graham*, 2 Ohio St. 131; *Union Mut. Ins. Co. v. Indianapolis, etc., R. Co.*, 1 Disney (Ohio) 480.

S. C.—*Levy v. Southern Express Co.*, 4 S. C. 234.

Tenn.—*Walker v. Skipwith, Meigs* (Tenn.) 502, 33 Am. Dec. 161.

Vt.—*Winchell v. National Express Co.*, 64 Vt. 15; *Mann v. Birchard*, 40 Vt. 326; *Blumenthal v. Brainard*, 38 Vt. 402, 91 Am. Dec. 350; *Kimball v. Rutland, etc., R. Co.*, 26 Vt. 247, 62 Am. Dec. 567; *Farm-*

yet when the notice is not unreasonable, and is clear and explicit, and is brought home to the shipper, or the course of business is well understood and has been often acted upon without question, the limitation which it imposes may be binding upon the shipper.³⁴

§ 4. Limitation by special contract.

In the earlier cases in New York it was held that a common carrier could not, even by express contract, restrict its common law

ers', etc., *Bank v. Champlain Transp. Co.*, 18 Vt. 131, 23 Vt. 186, 56 Am. Dec. 68.

W. Va.—*Brown v. Adams Express Co.*, 15 W. Va. 812.

Eng.—*Peck v. North Staffordshire R. Co.*, 10 H. L. Cas. 473, 32 L. J. Q. B. 241; *Doolan v. Midland R. Co.*, L. R. 2 App. 792, 25 W. R. 882; *Cohen v. South Eastern R. Co.*, 2 Exch. Div. 253, 46 L. J. Exch. Div. 417.

Can.—*Grand Trunk R. Co. v. Vogel*, 11 Can. Sup. Ct. 612, 27 Am. & Eng. R. Cas. 18; *Fitzgerald v. Grand Trunk R. Co.*, 4 Ont. App. 601, 5 Can. Sup. Ct. 209.

34. *Bingham v. Rogers*, 6 W. & S. (Pa.) 495, 50 Am. Dec. 581; *Beckman v. Shouse*, 5 Rawle (Pa.) 179, 28 Am. Dec. 653. These decisions have been questioned in later cases. In *Laing v. Colder*, 8 Pa. St. 479, 49 Am. Dec. 533, the court says: "The expediency of recognizing in the carrier a right to do so by a general notice has been strongly and justly questioned, and in some of our sister states altogether denied. Were the question an open one in Pennsylvania, I should, for one, unhesitatingly follow them in repudiating a principle which places the bailor absolutely at the mercy of the carrier,

whom in a vast majority of instances, he cannot but choose to employ." See also *Farnham v. Camden, etc., R. Co.*, 55 Pa. St. 53; *Pennsylvania Cent. R. Co. v. Schwarzenberger*, 45 Pa. St. 208, 84 Am. Dec. 490; *Verner v. Schweitzer*, 32 Pa. St. 208; *Camden, etc., R. Co. v. Baldauf*, 16 Pa. St. 67, 55 Am. Dec. 481.

In Maine the rule is that notice brought home to the owner of the goods, at or before the time of delivery for shipment, if either expressly or impliedly assented to by the owner, will restrict the carrier's liability. *Little v. Boston, etc., R. Co.*, 66 Me. 239; *Sager v. Portsmouth, etc., R. Co.*, 31 Me. 228, 50 Am. Dec. 659; *Fillebrown v. Grand Trunk R. Co.*, 55 Me. 462, 92 Am. Dec. 606.

In North Carolina it is held that common carriers may, by notice brought to the knowledge of the owner, reasonably qualify their liability in certain cases, as, if the notice be that they will not be liable for glass in a box, or articles of unusual value, unless informed of the facts. *Smith v. North Carolina R. Co.*, 64 N. C. 235.

In Kentucky it has been held "that public notice given by the carrier and brought home to the knowledge of the shipper, enters into the

liability.³⁵ But these cases were modified by later authorities and the courts determined that a carrier may limit its responsibility by an express agreement with the owner, in the form of a special acceptance of the goods to be transported.³⁶ The courts in England and America, both State and Federal, now generally maintain the rule that a carrier may, by special contract not unreasonable between himself and the shipper or passenger, limit its common law liability.³⁷ It is usual for the consignor, on delivery of goods for transportation to a carrier, to receive a bill of lading, expressing the terms and conditions upon which the merchandise is to be carried. He is presumed to assent to its conditions because he receives it under circumstances which, by the ordinary usages of business, would naturally lead him to infer that the document he receives, which is his muniment of title, *quasi* negotiable and upon the faith of which he may borrow money, is a contract and not a mere receipt.³⁸ The rule is, therefore, generally recognized in the United States that the acceptance by the shipper or his agent of a receipt or bill of lading signed by the carrier expressing the terms and conditions upon which the goods are received, and are to be carried, and containing a limitation of the carrier's liability, constitutes in the absence of fraud or imposition, where the limitation is not illegal or unreasonable, a contract controlling

contract of affreightment so far as the carrier has a right to impose terms, either by express or implied contract, unless the notice is inconsistent with the terms of the express contract." *Orndorff v. Adams Express Co.*, 3 Bush (Ky.), 194, 96 Am. Dec. 207. See also *Adams Express Co. v. Nock*, 2 Duv. (Ky.) 562, 87 Am. Dec. 510.

35. *Cole v. Goodwin*, 19 Wend. (N. Y.) 251, 32 Am. Dec. 470; *Gould v. Hill*, 2 Hill (N. Y.), 623; *Hollister v. Nowlen*, 19 Wend. (N. Y.) 234, 32 Am. Dec. 455.

36. *Dorr v. New Jersey Steam Nav.*

Co., 11 N. Y. 485; *Parsons v. Monteath*, 13 Barb. (N. Y.) 353; *Moore v. Evans*, 14 Barb. (N. Y.) 524, overruling *Gould v. Hill*, 2 Hill (N. Y.) 623; *Fibel v. Livingston*, 64 Barb. (N. Y.) 179; *Mercantile Mut. Ins. Co. v. Chase*, 1 E. D. Sm. (N. Y.) 115.

37. *Erie R. Co. v. Wilcox*, 84 Ill. 239, 25 Am. Rep. 451, 16 Am. Ry. Rep. 457; *Illinois Cent. R. Co. v. Schwartz*, 13 Ill. App. 490; *Thayer v. St. Louis, etc., R. Co.*, 22 Ind. 26, 85 Am. Dec. 409; *Camp v. Hartford, etc., Steamboat Co.*, 43 Conn. 333; *Feige v. Michigan Cent. R. Co.*, 62 Mich. 1;

the rights of the parties.³⁹ The rule is maintained even though it be shown that the consignor did not read the bill of lading, since it was his duty to do so.⁴⁰ It is not essential to the validity of such

Michigan Cent. R. Co. v. Hale, 6 Mich. 243; Potts v. Wabash, etc., R. Co., 17 Mo. App. 394; Bingham v. Rogers, 6 W. & S. (Pa.) 495, 40 Am. Dec. 581; Richmond, etc., R. Co. v. Payne, 86 Va. 481, 42 Am. & Eng. R. Cas. 366; Baltimore, etc., R. Co. v. Rathbone, 1 W. Va. 87, 88 Am. Dec. 664; Zouch v. Chesapeake, etc., R. Co., 36 W. Va. 524, 19 Am. & Eng. R. Cas. 711; Fitzgerald v. Grand Trunk R. Co., 4 Ont. App. 601, 28 U. C. C. P. 586; Southcote's Case, 4 Coke 84; Morse v. Slue, 1 Vent. 238; Nicholson v. Willan, 5 East 507; Smith v. Horn, 8 Taunt. 144, 4 E. C. L. 50; Anon v. Jackson, 2 Peake N. P. 185.

38. Long v. New York Cent. R. Co., 50 N. Y. 76; Huntington v. Dinsmore, 4 Hun (N. Y.) 66, 6 T. & C. (N. Y.) 195; Grace v. Adams, 100 Mass. 505; Snider v. Adams Express Co., 63 Mo. 376; Brehme v. Adams Express Co., 25 Md. 328; McMahon v. Macy, 51 N. Y. 155; Farnham v. Camden, etc., R. Co., 55 Pa. St. 53; American Express Co. v. Second National Bank, 69 Pa. St. 394; Logan v. Mobile Trade Co., 46 Ala. 514.

39. U. S.—Michigan Cent. R. Co. v. Mineral Springs Mfg. Co., 16 Wall. (U. S.) 329.

N. Y.—Kirkland v. Dinsmore, 62 N. Y. 171, 20 Am. Rep. 475; Belger v. Dinsmore, 51 N. Y. 166, 10 Am. Rep. 575.

Ark.—St. Louis, etc., R. Co. v. Weakly, 50 Ark. 397, 35 Am. & Eng. R. Cas. 635, 7 Am. St. Rep. 104.

Ind.—Adams Express Co. v. Carnahan (Ind. App.), 63 N. E. 245, 64 N. E. 647.

Kan.—Atchison, etc., R. Co. v. Dill, 48 Kan. 210, 55 Am. & Eng. R. Cas. 378.

Ky.—Adams Express Co. v. Nock, 2 Duv. (Ky.) 563, 87 Am. Dec. 510.

Mass.—Grace v. Adams, 100 Mass. 505, 97 Am. Dec. 117, 1 Am. Rep. 131.

Miss.—Southern Express Co. v. Moon, 39 Miss. 832.

Mo.—Levering v. Union Transp., etc., Co., 42 Mo. 88, 97 Am. Dec. 320.

N. H.—Merrill v. American Express Co., 62 N. H. 514.

R. I.—Ballou v. Earle, 17 R. I. 441, 33 Am. St. Rep. 881, 48 Am. & Eng. R. Cas. 31.

Tenn.—East Tennessee, etc., R. Co., v. Brumley, 5 Lea (Tenn.) 401; Dillard v. Louisville, etc., R. Co., 2 Lea (Tenn.) 288.

Vt.—Davis v. Central Vermont R. Co., 66 Vt. 290, 44 Am. St. Rep. 852, 61 Am. & Eng. R. Cas. 197. Compare Blumenthal v. Brainard, 38 Vt. 402, 91 Am. Dec. 350.

Wis.—Proof that shipper took a receipt containing provisions restricting the carrier's liability is *prima facie* evidence of his assent to them. Morrison v. Phillips, etc., Constr. Co., 44 Wis. 405, 28 Am. Rep. 599, 19 Am. Rep. 312; Boorman v. American Express Co., 21 Wis. 154; Strohn v. Detroit, etc., R. Co., 21 Wis. 554, 94 Am. Dec. 554.

a limitation that it be shown that the shipper was aware of it, or that it had been explained to him, or that his attention had been called to it, or that it was brought to the knowledge of the shipper himself where his agent assented to the stipulation, provided the carrier has used no deception or improper means to prevent the shipper or his agent from noticing or objecting to the provision limiting liability.⁴¹ In the absence of fraud, concealment, or improper practice, the legal presumption is that stipulations limiting the common law liability of common carriers, contained in a receipt or bill of lading given to a shipper or passenger, are known to the party receiving it, and that he has read and assented to

40. *Grace v. Adams*, 100 Mass. 505; *Snider v. Adams Express Co.*, 63 Mo. 376; *Mulligan v. Illinois Cent. R. Co.*, 36 Iowa 181; *American M. U. Express Co. v. Schier*, 55 Ill. 140, the question whether the shipper assented to the restrictions and conditions in an inland bill of lading is one of fact for the jury. See also *Illinois Cent. R. Co. v. Jonte*, 13 Brad. (Ill. App.) 424.

41. *N. Y.*—*Zimmer v. New York Cent., etc.*, R. Co., 137 N. Y. 460; *Hill v. Syracuse, etc.*, R. Co., 73 N. Y. 351, 29 Am. Rep. 163; *Germania F. Ins. Co. v. Memphis, etc.*, R. Co., 72 N. Y. 90, 28 Am. Rep. 113; *Kirkland v. Dinsmore*, 62 N. Y. 171, 20 Am. Rep. 475. See also *Fowler v. Liverpool, etc., Steam Co.*, 87 N. Y. 190, 9 Am. & Eng. R. Cas. 235; *Coffin v. New York Cent. R. Co.*, 64 Barb. (N. Y.) 379, 56 N. Y. 632.

Ala.—*Western R. Co. v. Harwell*, 97 Ala. 341; *Louisville, etc., R. Co. v. Meyer*, 78 Ala. 597.

Iowa.—*Mulligan v. Illinois Cent. R. Co.*, 36 Iowa 181.

Ky.—*Louisville, etc., R. Co. v. Brownlee*, 14 Bush. (Ky.) 590.

Mass.—*Quimby v. Boston, etc., R. Co.*, 150 Mass. 365; *Hill v. Boston, etc., R. Co.*, 144 Mass. 284, 28 Am. & Eng. R. Cas. 88; *Monitor Mut. F. Ins. Co. v. Buffum*, 115 Mass. 343.

Mo.—*Kellerman v. Kansas City, etc., R. Co. (Kan.)*, 34 S. W. 41; *Patterson v. Kansas City, etc., R. Co.*, 56 Mo. App. 657.

S. C.—*Johnstone v. Richmond, etc., R. Co.*, 39 S. C. 55, 55 Am. & Eng. R. Cas. 346.

Wis.—*Morrison v. Phillips, etc., Constr. Co.*, 44 Wis. 405, 19 Am. Ry. Rep. 312, 28 Am. Rep. 599.

Eng.—*Burke v. South Eastern R. Co.*, 5 C. P. Div. 1; *Harris v. Great Western R. Co.*, 1 Q. B. Div. 515; *O'Rorke v. Great Western R. Co.*, 23 U. C. Q. B. 427.

Tex.—*Ryan v. Missouri, etc., R. Co.*, 65 Tex. 13, 23 Am. Eng. R. Cas. 707, 57 Am. Rep. 589; *International, etc., R. Co. v. Watt*, 2 Tex. App. Civ. Cas. § 781.

The insertion of a stipulation limiting the liability of a carrier in a bill of lading, and the receipt of the goods under it, are not sufficient evidence of an assent to such exemption by the

them.⁴² But a special contract limiting the liability of the carrier is only binding upon the shipper when fairly and freely executed or assented to by him, and he will not be bound by it when obtained unfairly or through fraud or misrepresentation, nor will his assent be implied where undue advantage has been taken of him.⁴³ The general rule is not followed by the courts of Illinois and Ohio, but it is there held that the express assent of the shipper to the limitation must be shown, and that it cannot be implied or presumed from the mere acceptance of the receipt or bill of lading containing the limitation, although the fact of acceptance may be con-

shipper or consignee to render such stipulation binding upon the latter. *The Guildhall*, 58 Fed. 796.

Where, under a custom, a railroad company, on shipment of goods, instead of issuing a bill of lading, signed a receipt for the goods prepared by the shipper, which at the instance of the railroad company contained the clause, "subject to the terms and conditions of the R. R. Co.'s bill of lading," and such bill of lading contained the condition that "no carrier or party in possession of all or any of the property herein described shall be liable for any loss thereof or damage thereto by causes beyond its control, or by floods or fire" not due to its own negligence, the provisions of such bill of lading become incorporated into the contract of shipment, though the shipper was not aware that such provision was contained therein, he having the means to acquaint himself of such fact, and in such case neither the shipper nor the consignee can recover for the loss by fire of the goods shipped, while in possession of the

carrier or of a connecting carrier bound by the same contract of shipment; such loss occurring without the negligence of such carriers. *Cincinnati, etc., R. Co. v. Berdan*, 22 Ohio Cir. Ct. R. 326.

42. *Steers v. Liverpool, etc., Steam ship Co.*, 57 N. Y. 1, 15 Am. Rep. 453; *McMillan v. Michigan Southern, etc., R. Co.*, 16 Mich. 79, 93 Am. Dec. 208; *Ballou v. Earle*, 17 R. I. 441, 33 Am. St. Rep. 881, 48 Am. & Eng. R. Cas. 31; *International, etc., R. Co. v. Watt*, 2 Tex. App. Civ. Cas. § 781. Compare *Brown v. Adams Express Co.*, 15 W. Va. 812.

It may be a question for the jury whether or not the shipper actually assented to the limitation in question. *Baltimore, etc., R. Co. v. Brady*, 32 Md. 333; *Palmer v. Grand Junction R. Co.*, 4 M. & W. 749, 3 Jur. 559, 7 D. P. C. 232.

43. *Atchison, etc., R. Co. v. Dill*, 48 Kan. 210, 29 Pac. 148; *Union Pac. R. Co. v. Marston*, 30 Neb. 241, 45 Am. & Eng. R. Cas. 328; *Simons v. Great Western R. Co.*, 2 O. B. N. S. 620, 89 E. C. L. 620.

sidered as some evidence of assent.⁴⁴ In Georgia the statute provides that no contract limiting the liability of a common carrier shall be valid unless it has the express assent of the shipper.⁴⁵

§ 5. Special contract must be express and will not be presumed.

In the absence of evidence to the contrary, it is to be assumed that property accepted by the carrier for transportation is taken under the responsibility cast upon it by the common law, except as modified by statute, and, if lost under circumstances which render the carrier liable by the general rule of law, it must respond, unless it can show that there was a special acceptance, equivalent to a contract, which exempts it from the ordinary liability of common carriers.⁴⁶ The fact that the carrier was accustomed to give to shippers receipts containing provisions

44. *Ill.*—Chicago, etc., R. Co. v. Simon, 160 Ill. 648, affg. 57 Ill. App. 502; Chicago, etc., R. Co. v. Harmon, 12 Ill. App. 54; Indianapolis, etc., R. Co. v. Jurey, 8 Ill. App. 160 Merchants' Despatch Transp. Co. v. Furthmann, 149 Ill., 66, 61 Am. & Eng. R. Cas. 145; Erie R. Co. v. Wilcox, 84 Ill. 239, 25 Am. Rep. 451, 16 Am. Ry. Rep. 457; Merchants' Despatch Transp. Co. v. Joesting, 89 Ill. 153; Merchants' Despatch Transp. Co. v. Leysor, 89 Ill. 43; Field v. Chicago, etc., R. Co., 71 Ill. 458; Anchor Line v. Dater, 68 Ill. 339; United States Express Co. v. Haines, 67 Ill. 137; Adams Express Co. v. Stetteners, 61 Ill. 184; 11 Am. Rep. 57; Illinois Cent. R. Co. v. Frankenberg, 54 Ill. 88, 5 Am. Rep. 92; Adams Express Co. v. Haynes, 42 Ill. 89. See Anchor Line v. Knowles, 66 Ill. 150; Black v. Wabash, etc., R. Co., 111 Ill. 351, 53 Am. Rep. 628.

of assent: Erie, etc., Transp. Co. v. Dater, 91 Ill. 195, 33 Am. Rep. 51; Boscowitz v. Adams Express Co., 93 Ill. 523, 34 Am. Rep. 191. See also Merchants' Despatch Transp. Co. v. Theilbar, 86 Ill. 71.

Ohio.—Pittsburgh, etc., R. Co. v. Barrett, 36 Ohio St. 448, 3 Am. & Eng. R. Cas. 256; Gaines v. Union Transp., etc., Co., 28 Ohio St. 418, 14 Am. Ry. Rep. 158; Davidson v. Graham, 2 Ohio St. 131.

45. Georgia R. Co. v. Spears, 66 Ga. 485, 42 Am. Rep. 81; Wallace v. Sanders, 42 Ga. 486; Southern Express Co. v. Newby, 36 Ga. 635, 91 Am. Dec. 783; Purcell v. Southern Express Co., 34 Ga. 315; Southern Express Co. v. Barnes, 36 Ga. 532.

46. Park v. Preston, 108 N. Y. 434, 15 N. E. 705; Madan v. Sherard, 73 N. Y. 330; Blossom v. Dodd, 43 N. Y. 264; Dorr v. New Jersey Steam Nav. Co., 11 N. Y. 485.

Acceptance of receipt some evidence

limiting its liability will not support a presumption that there was a special contract limiting its liability in the absence of any showing that such receipt was never given or came to the knowledge of the shipper,⁴⁷ nor will the carrier be absolved from liability by evidence that the shipper or his agent previously knew of conditions in the shipping bills or receipts usually given, which would discharge the carrier from liability for the loss sustained.⁴⁸ Mere notices brought home to the owner of the goods, by which the carrier seeks to avoid or limit its common law liability, but which are not expressly assented to, cannot be availed of to defeat a claim for loss.⁴⁹

§ 6. Contract need not be signed by shipper unless required by statute.

Although, as we have seen, the contract limiting the carrier's liability must be express and cannot be implied, the assent of the shipper to the contract may be implied and the contract need not be signed by the shipper, unless a statute requires such signature by him.⁵⁰ But under a statute providing that the obligations of a common carrier cannot be limited by general notice, and that, except as to the rate of hire, time, place and manner of delivery, the acceptance of a ticket, bill of lading, or written contract, shall not constitute an acceptance of provisions modifying the carrier's obligations, unless the person accepting it manifests his assent by his signature, a provision in such contract or receipt exempting the company from liability is of no effect, where such contract

47. *London, etc., F. Ins. Co. v. Rome, etc., R. Co.*, 144 N. Y. 200, affg. 68 Hun (N. Y.) 598, 23 N. Y. Supp. 231.

48. *Reed v. Fargo*, 7 N. Y. Supp. 185; *Pearsall v. Western Union Tel. Co.*, 124 N. Y. 256, 26 N. E. 534; *Kirkland v. Dinsmore, etc.*, 62 N. Y. 171, 175; *Pittsburgh, etc., R. Co., v.*

Barrett, 36 Ohio St. 448, 3 Am. & Eng. R. Cas. 256.

49. *Gott v. Dinsmore*, 111 Mass.

52. The assent of the shipper to certain express provisions in the receipt or bill of lading may be proven by implication, but not the provisions themselves. *Dillard v. Louisville, etc., R. Co.*, 2 Lea (Tenn.) 288.

50. See last preceding section.

or receipt was signed only by the carrier's agent.⁵¹ But such a contract may still be binding on the carrier, under such a statute, whether signed by the shipper or not.⁵²

§ 7. Where there are two contracts limiting liability.

Where there are two contracts of shipment, both representing the same shipment, limiting the carrier's liability, the carrier is bound by the one which is the least beneficial to itself.⁵³ Where the carrier has posted one set of notices stating the conditions on which it will transport freight, and has advertised different conditions in printed hand bills spread abroad, it will be bound by the conditions which hold it more nearly to its common law liability.⁵⁴ Where a shipping receipt, signed by the carrier's agent only, limited the amount for which damages would be paid, while a special agreement under seal signed by the shipper released the carrier from all liability, it was held that the receipt and release were separate and distinct contracts, prepared and executed at the instance of the carrier, and the carrier could not, in its own interest, elect which should be the shipping contract; that the shipping receipt, not under seal or witnessed, and not regarded by the carrier as the shipping contract, could not be deemed the contract under which the goods were carried; the other agreement was the shipping contract, and the limitations therein being void as against public policy because attempting to release the carrier from all liability for negligence, the shipper was not precluded from recovering the full value of his goods; that, if both papers constitute but one contract, both are tainted with the illegality, and are

51. *Hartwell v. Northern Pac. Express Co.*, 5 Dak. 463, 37 Am. & Eng. R. Cas. 635; *Hazel v. Chicago, etc., R. Co.*, 82 Iowa 477, 49 Am. & Eng. R. Cas. 78.

52. *Baxendale v. Great Eastern R. Co.*, 10 B. & S. 212, L. R. 4 Q. B. 244,

3 Ry. & C. T. Cas. XXV., as to such provision in the English Railway and Canal Traffic Act.

53. *Munn v. Baker*, 2 Stark. 255, 3 E. C. L. 399.

54. *St. Louis, etc., R. Co. v. Smuck*, 49 Ind. 302.

therefore void, and the liability of the carrier must be determined under the principles of the general law.⁵⁵

§ 8. Conflict of oral and written agreements.

A common carrier may, by special contract, limit its liability, and, in the absence of fraud or mistake, the contract, signed by the shipper, is the sole evidence of the agreement, although it differs from the previous oral agreement, and the shipper did not read it.⁵⁶ The presumption is that the written contract contains the entire agreement, and the general rule applies that oral testimony cannot be admitted to contradict or vary its provisions.⁵⁷ A final written contract between the shipper and the carrier supersedes all prior agreements relating to the same matter.⁵⁸ A subsequent oral agreement cannot be shown to relieve the carrier from its liability under a written contract.⁵⁹ Where a written contract was entered into after the breach of an oral contract in relation to the same matter, the written contract did not merge the oral contract and would not bar a recovery for the breach of it.⁶⁰ So, a written

55. *Woodburn v. Cincinnati, etc., R. Co.*, 40 Fed. 731, 42 Am. & Eng. R. Cas. 514.

56. *St. Louis, etc., R. Co. v. Cleary*, 77 Mo. 634, 46 Am. Rep. 13, 16 Am. & Eng. R. Cas. 122; *Missouri Pac. R. Co. v. Fagan*, 72 Tex. 127, 13 Am. St. Rep. 776, 2 L. R. A. 75, 9 S. W. 749, testimony cannot be elicited from a shipper on cross-examination as to the nature of his agreement, where the contract of shipment is in writing.

57. *McFadden v. Missouri Pac. R. Co.*, 92 Mo. 343, 1 Am. St. Rep. 721, 30 Am. & Eng. R. Cas. 17, but a recital in a written contract of carriage that the rate is a special and reduced one may be contradicted by parol evidence; *Minneapolis, etc., R. Co. v. Home Insurance Co.*, 55 Minn.

236; *Western, etc., R. Co. v. McElwee*, 6 Heisk. (Tenn.) 208; *Dixon v. Columbus, etc., R. Co.*, 4 Biss. (U. S.) 137, where a freight bill was signed by certain parties as agents, but there was nothing to indicate that it was the contract of the railroad company, parol evidence to show that it was the contract of the company was inadmissible.

58. *Smith v. Findley*, 34 Kan. 316, 23 Am. & Eng. R. Cas. 712; *Leonard v. Chicago, etc., R. Co.*, 54 Mo. App. 293; *Hostetter v. Baltimore, etc., R. Co.*, (Pa.) 11 Atl. 609, 32 Am. & Eng. R. Cas. 549.

59. *Corbett v. Chicago, etc., R. Co.*, 86 Wis. 82.

60. *Harrison v. Missouri Pac. R. Co.*, 74 Mo. 364, 7 Am. & Eng. R. Cas. 382, 41 Am. Rep. 318; *Cross v.*

contract which does not contain the entire agreement made between the parties, but only a part of such agreement, and which is merely supplemental to a prior verbal agreement, does not merge such verbal contract, and the latter may be proven and the carrier will be liable thereunder, though such liability might not have existed under the written contract alone.⁶¹ A verbal contract which in no way varies or contradicts a written contract must be incorporated with it and the two together held to constitute the whole contract.⁶² Where the terms of the written contract are contradictory or ambiguous, the real contract under which the carrier received the property may be shown by parol evidence to explain the written contract.⁶³ Where a verbal contract between the parties was complete and the written contract set up by the carrier consisted of a receipt, handed to the shipper, of the contents of which he was ignorant, the verbal contract may be shown and will control.⁶⁴ In jurisdictions where the possession by the shipper of a receipt containing limitations upon the liability of the carrier is only *prima facie* evidence that he assented to its conditions, it has been held that where a shipper claims that the shipment was made under a special oral agreement and that the receipt was not delivered until some days after the shipment, it may be shown by other evidence that the shipment was in fact made under the oral agreement and the presumption arising from possession of the receipt thus rebutted.⁶⁵ On an

Graves, 4 Tex. App. Civ. Cas., § 100; Hamilton v. Western North Carolina R. Co., 96 N. C. 398.

61. *Shiff v. New York Cent., etc.*, R. C., 16 Hun (N. Y.), 278; *Hoskins v. Missouri Pac. R. Co.*, 19 Mo. App. 315; *Union R., etc., Co. v. Riegel*, 73 Pa. St. 72.

62. *Fitzgerald v. Grand Trunk R. Co.*, 27 U. C. C. P. 528.

63. *Saltsman v. New York Cent., etc.*, R. Co., 65 Hun (N. Y.), 443, 20 N. Y. Supp. 361.

64. *King v. Woodbridge*, 34 Vt. 565. So, where the written contract was signed after the goods left the station and was supposed by the shipper to be a mere receipt, evidence of a verbal contract, different from the written contract is admissible to show the real contract between the parties. *St. Louis, etc., R. Co. v. Clark*, 48 Kan. 321, 55 Am. & Eng. R. Cas. 367.

65. *Strohn v. Detroit, etc., R. Co.*, 21 Wis. 554, 94 Am. Dec. 564; *Wa-*

issue as to whether a shipment was made under a written contract or a subsequent parol contract between the carrier and the shipper, the latter has the right to show that the written contract was abandoned, and that the shipment was made under a subsequent parol contract.⁶⁶

§ 9. Contract must have been fairly entered into.

Contracts limiting the common law liability of carriers must have been fairly made and freely entered into in order to be binding on the shipper.⁶⁷ Where such special contracts have been procured by duress,⁶⁸ or by the arbitrary insertion of words in the contract by the carrier,⁶⁹ or under circumstances where the shipper did not have a complete understanding of the contract or freely accept the same,⁷⁰ or where the carrier has made unreasonable demands and succeeded in obtaining an undue advantage of the shipper,⁷¹ the courts will not sustain the contract. Such contracts are not favored by the courts. The carrier is bound to carry under its common law liability if the shipper insists upon it, and it is the latter's option to accept a contract of limited liability instead of the insurance that the common law requires of the carrier.⁷²

§ 10. Necessity of consideration.

A special contract between a shipper and a common carrier, or a stipulation in a bill of lading, qualifying or limiting the common

bash R. Co. v. Harris, 55 Ill. App. 159; Louisville, etc., R. Co. v. Craycraft, 12 Ind. App. 203; Missouri, etc., R. Co. v. Carter, 9 Tex. Civ. App. 677.

66. Toledo, etc., R. Co. v. Levy, 127 Ind. 168, 26 N. E. 773.

67. Atchison, etc., R. Co. v. Dill 48 Kan. 210, 55 Am. & Eng. R. Cas. 355, 29 Pac. 148.

68. Missouri, etc., R. Co. v. Carter, 9 Tex. Civ. App. 677.

69. Kansas City, etc., R. Co. v.

Simpson, 30 Kan. 645, 16 Am. & Eng. R. Cas. 158, 46 Am. Rep. 104.

70. Adams Express Co. v. Nock, 2 Duv. (Ky.) 562, 87 Am. Dec. 510.

71. Simons v. Great Western R. Co., 2 C. B. N. S. 620, 89 E. C. L. 620; Hance v. Wabash Western R. Co., 56 Mo. App. 476; Paddock v. Missouri Pac. R. Co., 1 Mo. App. Rep. 87.

72. Wallace v. Matthews, 39 Ga. 617, 99 Am. Dec. 473.

law liability of the carrier must be supported by a valuable consideration, apart from the mere acceptance of the property for carriage and agreement to transport it, such, for example, as a special or reduced rate which is an actual reduction from the usual freight rate,⁷³ or additional facilities for transportation.⁷⁴ Both rates of transportation offered the shipper must be reasonable and he must be given the option to make his selection, in order to render the consideration of a reduced rate valid and sufficient.⁷⁵ Where there is but one contract and one rate open

73. *Ullman v. Chicago, etc., R. Co.*, 112 Wis. 168, 88 N. W. 41; *Lake Erie, etc., R. Co. v. Holland (Ind.)*, 69 N. E. 138, 63 L. R. A. 948; *Hance v. Wabash Western R. Co.*, 56 Mo. App. 476; *Mourton v. Louisville, etc., R. Co. (Ala.)*, 29 So. 602; *Southard v. Minneapolis, etc., R. Co.*, 60 Minn. 382; *Wehmann v. Minneapolis, etc., R. Co.*, 58 Minn. 22, 61 Am. & Eng. R. Cas. 273.

Surrender of a prior verbal contract is sufficient consideration for a substituted written one. *Leonard v. Chicago, etc., R. Co.*, 54 Mo. App. 293.

A provision in a shipping receipt that no carrier shall be liable for damage by wet not due to its own negligence or that of its servants is binding where entered into in consideration of a reduced rate of shipment. *Mears v. New York, etc., R. Co. (Conn.)*, 52 Atl. 610, 56 L. R. A. 884.

74. *Gardner v. Southern R. Co.*, 127 N. C. 293, 37 S. E. 328. The clause in a bill of lading limiting the carrier's liability will not be held valid on the ground that a reduced rate was intended, no rate being specified, and none being talked of by

the parties. *Phoenix Powder Mfg. Co. v. Wabash R. Co.*, 120 Mo. App. 566, 97 S. W. 256, 74 S. W. 492.

75. *Duvenick v. Missouri Pac. R. Co.*, 57 Mo. App. 550; *Louisville, etc., R. Co. v. Sowell*, 90 Tenn. 17, 49 Am. & Eng. R. Cas. 166.

There must be an actual freedom of choice between different rates offered: *St. Louis S. W. Ry. Co. v. Phoenix Cotton Oil Co.*, 88 Ark. 594, 115 S. W. 393; *Little Rock, etc., R. Co. v. Cravens*, 57 Ark. 112, 55 Am. & Eng. R. Cas. 650; *Little Rock, etc., R. Co. v. Eubanks*, 48 Ark. 460, 3 Am. St. Rep. 245, 31 Am. & Eng. R. Cas. 176; *Deming v. Merchants' Cotton Press Co.*, 90 Tenn. 306.

Parol evidence is admissible to show that a pretended reduced rate was actually the regular rate always charged, and the recital in the bill of lading that a reduced rate is not allowed is not conclusive. *McFadden v. Missouri Pac. R. Co.*, 92 Mo. 343, 1 Am. St. Rep. 721, 30 Am. & Eng. R. Cas. 17.

Findings in an action against an express company for loss of goods that the company, on receiving the goods, gave the consignor a receipt therefor which limited the company's

and offered to the shipper by a common carrier, and no option is given him, a special provision limiting the common-law liability of the carrier to "loss or damage occasioned by wrongful acts or gross negligence" is without consideration and void.⁷⁶ If no reduced rates were in fact allowed the shipper the limitation is invalid as being without consideration,⁷⁷ or if the higher rate adopted by the carrier for shippers not signing a contract limiting liability is illegal as in excess of the rate allowed by statute, although the statutory rate is actually in excess of that charged the shipper in signing the contract.⁷⁸ So also where there is no real option offered to the shipper because the agent of the carrier has no authority to offer transportation except at a particular rate fixed by his superior,⁷⁹ or the carrier's rules would not have permitted the shipment unless the shipper accepted the bill of lading with its limitations.⁸⁰ A stipulation in a contract for shipment of perishable freight, "Subject to delay," inserted without any further reductions of rate than ordinarily charged on a bill of lading at owner's risk, is without consideration and void.⁸¹ Where a contract partially exempting a railroad from liability for injury to goods shipped was made in consideration of a reduced rate, but the company charged a rate in excess of that

liability to the sum fixed as the value of the property, and that the consignor was informed that the rate was 25 cents if the value did not exceed \$50, and that she authorized the agent of the company to fix the value at \$100, and was informed that the charges were 35 cents, and that she knew the charges were graduated according to the value of the property, show an agreement limiting the company's liability, based on a consideration. *Adams Express Co. v. Carnahan* (Ind. App.), 63 N. E. 245, 64 N. E. 647.

76. *Illinois Cent. R. Co. v. Lancashire Ins. Co.* (Miss.), 30 So. 43.

77. *Ward v. Missouri Pac. R. Co.*, 158 Mo. 226, 58 S. W. 28; *Gulf, etc., R. Co. v. McCarty*, 82 Tex. 608; *Gulf, etc., R. Co. v. Wright*, 1 Tex. Civ. App. 492.

78. *Paddock v. Missouri Pac. R. Co.*, 1 Mo. App. Rep. 87, 60 Mo. App. 328.

79. *Kansas Pac. R. Co. v. Reynolds*, 17 Kans. 251; *Louisville, etc., R. Co. v. Gilbert*, 88 Tenn. 430, 42 Am. & Eng. R. Cas. 372.

80. *St. Louis, etc., R. Co. v. Spann*, 57 Ark. 127.

81. *Parker v. Atlantic, etc., R. Co.*, 133 N. C. 335, 63 L. R. A. 827, 45 S. E. 658, 43 S. E. 1005.

stipulated in the contract, it was not entitled to insist upon its exemption from liability.⁸² But the lack of an independent consideration for an exemption of a carrier from liability for damages caused by fire, expressed in the bill of lading, cannot successfully be urged to avoid such provision, although the carrier may have had but one rate, where the consideration expressed was sufficient to support the entire contract made.⁸³ Where it is entirely competent for parties to enter into a contract, and an agreement is made that, in consideration of a stipulated sum, the carrier agrees to perform certain services upon condition of certain exemptions, sufficient consideration is to be found in the carrier's obligation thus assumed to support the exemption provided for in the contract.⁸⁴ But if not, in the absence of proof to the contrary, sufficient consideration in the way of reduced rates or special privileges will be presumed and need not be proved.⁸⁵ Provisions of a contract as to the loading and unloading by the shipper and timely notice of injury to be given to the carrier,⁸⁶ or limiting the liability of the carrier for goods shipped to a point beyond its own line,⁸⁷ need not be supported by additional consideration than the contract of shipment, as, of reduced rates, in

82. *Hendrix v. Wabash R. Co.*, (Mo. App.), 80 S. W. 970.

83. *Cau v. Texas, etc., R. Co.*, 24 S. Ct. 663, 194 U. S. 427, 48 L. Ed. 1053, affg. 113 Fed. 91, 51 C. C. A. 76. See also *Texas, etc., R. Co. v. Cau*, 120 Fed. 15, 645.

84. *Nelson v. Hudson River R. Co.* 48 N. Y. 498; *Rubens v. Ludgate Hill Steamship Co.*, 20 N. Y. Supp. 481; *York Co. v. Illinois Cent. R. Co.*, 3 Wall. (U. S.) 107. See, also, *Jennings v. Grand Trunk R. Co.*, 127 N. Y. 438, affg. 52 Hun (N. Y.), 227.

85. *Brown v. Louisville, etc., R. Co.*, 36 Ill. App. 140.

Where receipts contain no limitations and subsequent bills of lading

have stipulations limiting liability, the latter will be presumed to be without consideration. *Southard v. Minneapolis, etc., R. Co.*, 60 Minn. 382.

Where the evidence is conflicting as to whether money paid by the carrier to the shipper was a rebate obtained on the charges for shipment or was in consideration of the assumption by the shipper of all risk of loss by fire, the presumption would be in favor of the payment being a rebate. *Thomas v. Wabash, etc., R. Co.*, 63 Fed. 200.

86. *Crow v. Chicago etc., R. Co.*, 57 Mo. App. 135.

87. *Hance v. Wabash Western R. Co.*, 56 Mo. App. 476.

cases where the contract limits the common law liability of the carrier. The latter is in effect a stipulation to carry the property only to the terminus of its own line, which is all that its duty as a carrier requires. If the consignor of goods had no express or implied authority to limit the carrier's common-law liability to obtain a lower express rate, contrary to the Interstate Commerce Act and Elkins Act, it cannot be said that the contract was made void by such limitation as to the consignee who had no knowledge of such limitation when the shipment was made.⁸⁸ A contract limiting liability in the transportation of freight in consideration of a reduced rate is not enforceable against the shipper, unless he received the benefit of the reduced rate.⁸⁹ A contract limiting a carrier's liability in consideration of a reduction of rates is not unenforceable, where the carrier did not transport the freight at the reduced rate.⁹⁰ A contract of carriage limiting the liability of the carrier for loss or injury regardless of actual loss must be based on a sufficient consideration. Mere agreement for transportation between parties to a shipment will not support an agreement to limit the carrier's common-law liability; an independent consideration, such as a reduced freight rate,⁹¹ or an agreement to

88. *Nonotuck Silk Co. v. Adams Express Co.*, 256 Ill. 66, 99 N. E. 893, aff'g judg. 166 Ill. App. 519; *Id.*, 256 Ill. 76, 99 N. E. 897, aff'g judg. 166 Ill. App. 525.

89. *Lacey v. Oregon R. & Nav. Co.*, (Or.) 128 Pac. 999.

90. *Colorado & S. Ry. Co. v. Manatt*, 21 Colo. App. 593, 121 Pac. 1012.

91. *U. S.—Inman & Co. v. Seaboard Air Line Ry. Co.*, 159 Fed. 960.

Ark.—St. Louis & S. F. R. Co. v. Pearce, 82 Ark. 339, 101 S. W. 760; *Southern Express Co. v. Hill*, 81 Ark. 1, 98 S. W. 371.

Idaho.—McIntosh v. Oregon R. & Nav. Co., 17 Idaho, 100, 105 Pac. 66.

Miss.—Jones v. Southern Express Co., *Miss.* —, 61 So. 165.

Mo.—Leas v. Quincy, etc., R. Co., 157 Mo. App. 455, 136 S. W. 963; *Burns v. Chicago, etc., Ry. Co.*, 151 Mo. App. 573, 132 S. W. 1; *McElwain v. St. Louis & S. F. R. Co.*, 151 Mo. App. 126, 131 S. W. 736; *Wilcox v. Chicago G. W. Ry. Co.*, 135 Mo. App. 193, 115 S. W. 1061; *Mires v. St. Louis & S. F. R. Co.*, 134 Mo. App. 379, 114 S. W. 1052; *Simmons Hardware Co. v. St. Louis, etc., Ry. Co.*, 140 Mo. App. 130, 120 S. W. 663; *Burgher v. Wabash R. Co.*, 139 Mo. App. 62, 120 S. W. 673; *Meyers v. Missouri, etc., Ry. Co.*, 120 Mo. App. 288, 96 S. W. 737.

Okl.—Missouri, etc., Ry. Co. v. McLaughlin, 29 Okl. 345, 116 Pac. 811.

Tex.—Chicago, etc., Ry. Co. v. Scott (Tex. Civ. App.), 156 S. W. 294

transport over its line and that of a connecting carrier,⁹² being necessary. The shipper must be given an opportunity to choose between the common-law right and rate and the special contract rate and limited liability.⁹³ A clause in a bill of lading exempting a carrier from liability for loss by fire is valid, although the regular freight rates were charged and no option was given to the shipper to receive any other form of bill of lading.⁹⁴ A provision in a bill of lading exempting the carrier from liability for loss of the property by fire is valid only in case a reduced rate or other consideration is allowed the shipper therefor.⁹⁵ A pass entitling a shipper to transportation without payment of fare is a good consideration to support a special contract made by him with the carrier limiting the latter's common-law liability.⁹⁶ A clause in a bill of lading restricting the carrier's liability by providing that it should not be liable for breakage or leakage of a stock of drugs shipped, where the regular local tariff rates were charged for the transportation, was void for want of consideration.⁹⁷ A reduction of freight rate is a sufficient consideration for a stipulation in a contract of carriage that, as a condition to recovery for injury, notice of claim of damages shall be given the carrier within a certain time.⁹⁸ A stipulation in a shipping contract that the shipper releases all causes of action which have accrued to him by any prior contract does not have the effect of releasing the carrier from liability for damages already accrued, unless there is a separate consideration for the release.⁹⁹ A shipping contract, reciting that the charge for

92. *Mobile & O. R. Co. v. Brownville Livery, etc., Co.*, Tenn. 130 S. W. 788.

93. *Ind.*—*Pittsburg, etc., Ry. Co. v. Mitchell*, 175 Ind. 196, 91 N. E. 735.

94. *Arthur v. Texas & P. Ry. Co.*, 204 U. S. 505, 27 Sup. Ct. 338, 51 L. Ed. 590, rev'g judg. 139 Fed. 127.

95. *Scott County Milling Co. v. St. Louis, etc., R. Co.*, 127 Mo. App. 85, 104 S. W. 924.

96. *J. H. Carter & Co. v. Southern Ry. Co.*, 3 Ga. App. 34, 59 S. E. 209.

97. *St. Louis, etc., Ry. Co. v. Caldwell*, 89 Ark. 218, 116 S. W. 210.

98. *St. Louis, etc., Ry. Co. v. Furlow*, 89 Ark. 404, 117 S. W. 517; *Libby v. St. Louis, etc., Ry. Co.*, 137 Mo. App. 276, 117 S. W. 659.

99. *St. Louis, etc., Ry. Co. v. Jones*, 93 Ark. 537, 125 S. W. 1025.

transportation was at the tariff rate, is a contract for the rate charged for shipments under a nonrelease contract, though it also recites that the rate is less than the rate charged for shipments at the carrier's risk, and hence there is no consideration for a stipulation releasing the carrier from certain liability.¹ There must be a consideration to sustain a stipulation in a bill of lading making notice of a claim for damages to goods in transit a condition precedent to recovery by the shipper.² A declaration contained in a bill of lading to the effect that a limitation of liability expressed in the bill was in consideration of a reduced rate is *prima facie* evidence of such reduction; and it was error to tell the jury in an action for damages for failure to transport safely, that they could not consider the contract as to the limitation without other evidence of consideration.³ A shipper of granite fully cut for cemetery work, who boxed it and billed it as "building stone" and thereby obtained a lower freight rate, in consideration of which he agreed to a valuation of twenty cents per cubic foot, is not entitled to complain of a defense on the basis of the agreed valuation, in an action to recover for its loss.⁴

§ 11. Contract signed by shipper without examination.

Where goods are delivered to a carrier for transportation, and before the goods are shipped, a bill of lading or receipt is delivered to the shipper, the latter is bound to ascertain its contents, and if he accepts without objection, he is bound by its terms; he may not set up ignorance of its contents nor resort to prior parol negotiations to vary them.⁵ So, if he execute a contract hurriedly,

1. *Holland v. Chicago, etc., Ry. Co.*, 139 Mo. App. 702, 123 S. W. 987.

2. *Blackmer & Post Pipe Co., v. Mobile & O. R. Co.*, 137 Mo. App. 479, 119 S. W. 1.

3. *Wabash R. Co. v. Curtis*, 134 Ill. App. 409.

4. *Harrison Granite Co. v. Grand Trunk Ry. System, Mich.* —, 141 N. W. 642.

5. *Germania Fire Ins. Co. v. Memphis, etc., R. Co.*, 72 N. Y. 90, 28 Am. Rep. 113; *Hill v. Syracuse, etc., R. Co.*, 73 N. Y. 352, 29 Am. Rep. 163; *West v. First National Bank*, 20 Hun (N. Y.), 411. See also *Hoadley v. Northern Transp. Co.*, 115 Mass. 304, 15 Am. Rep. 106; *Grace v. Adams*, 100 Mass. 505, 1 Am. Rep. 131; *Mulligan v. Illinois*

or without due examination, he cannot avoid the limitations imposed by it by showing that he was ignorant of its contents. If he signs a contract and acts under it in enjoyment of all its advantages, he cannot repudiate it upon the ground that its provisions were not brought to his attention. In the absence of fraud, misrepresentation, or mistake, he will be presumed to have read and assented to its provisions.⁶

§ 12. Contract must have been made at time of shipment.

The acceptance of a bill of lading without assenting to its conditions does not conclude one who has shipped goods under a verbal agreement before the bill of lading was tendered. The shipper cannot be deprived of any of his common law rights by subsequently receiving a bill of lading or receipt containing limitations and conditions to which his attention had not been called when he made the shipment.⁷ When goods are shipped under an oral agreement for transportation, such agreement is not merged in a bill of lading afterward delivered to the shipper, although it provides for a limitation of liability and that, by accepting it, the shipper agrees to the conditions, and the shipper is not concluded by an inadvertent omission to examine the conditions from showing the actual oral agreement of shipment.⁸ In order to limit the carrier's common law liability by a special contract or a clause in a bill of lading, the contract must have been made, or the bill of lading must have been taken, without dissent, at the time of the delivery of the property for transportation. When

R. Co., 36 Iowa, 81, 14 Am. Rep. 514; *Kirkland v. Dinsmore*, 62 N. Y. 171, 20 Am. Rep. 475; *Ullman v. Chicago, etc., R. Co.*, 112 Wis. 168, 88 N. W. 41.

6. *Nashville, etc., R. Co. v. Haslett (Tenn.)*, 79 S. W. 1031; *Bethea v. Northeastern R. Co.*, 26 S. C. 96; *Johnstone v. Richmond, etc., R. Co.*, 39 S. C. 55; *Coles v. Louisville, etc.,*

R. Co., 41 Ill. App. 607; *O'Rourke v. Great Western R. Co.*, 23 U. C. Q. B. 427.

7. *Lamb v. Camden, etc., R. Co.*, 4 Daly (N. Y.), 483; *Merchants' Despatch Transp. Co. v. Furthmann*, 149 Ill. 66, affg. 47 Ill. App. 561.

8. *Bostwick v. Baltimore, etc., R. Co.*, 45 N. Y. 712.

no receipt or bill of lading was given or contract made at the time of delivery, the carrier cannot limit its liability by a receipt or bill given afterwards and not assented to by the shipper or consignee.⁹ When the bill or receipt is given after shipment or loss or injury of the goods the limitations contained therein are void, and cannot affect the rights of the shipper under the verbal contract made at the time of shipment, in the absence of proof that the bill was accepted in place of the prior contract.¹⁰ Where, however, the carrier gives the consignor a shipping receipt stating that a bill of lading will be issued on application at a designated place and the goods transported subject to the conditions in the bill of lading, the consignor will be bound by the terms of the bill of lading,¹¹ and, where the intention of the parties is not clear, it may be a question for the jury whether a particular shipment was made under the oral contract or the subsequent written agreement.¹²

9. *Michigan Cent. R. Co. v. Boyd*, 91 Ill. 268; *American Express Co. v. Spellman*, 90 Ill. 455; *Kansas Pac. R. Co. v. Reynolds*, 17 Kan. 251; *Gulf, etc., R. Co. v. Wood* (Tex. Civ. App.), 30 S. W. 715.

Where plaintiff directed a delivery company to transport his baggage from a certain place, and paid the charges, a receipt given by an employe of the company, when he subsequently called for the baggage, to a person who pointed it out to him, did not constitute the contract, so as to limit the company's liability for the loss of the baggage to the amount stipulated therein. *Pompilj v. Manhattan Delivery Co.*, 84 N. Y. Supp. 230.

10. *Swift v. Pacific Mail Steamship Co.*, 106 N. Y. 206, 30 Am. & Eng. R. Cas. 105; *Park v. Preston*, 108 N. Y. 434; *Detroit, etc., R. Co.*

v. Adams, 15 Mich. 458, *McCullough v. Wabash Western R. Co.*, 34 Mo. App. 23; *Missouri, etc., R. Co. v. Carter*, 9 Tex. Civ. App. 677; *Louisville, etc., R. Co. v. Craycraft*, 12 Ind. App. 203; *Gulf, etc., R. C. v. Wood* (Tex. Civ. App.), 30 S. W. 715; *Louisville, etc., R. Co. v. Meyer*, 78 Ala. 597, 27 Am. & Eng. R. Cas. 44; *Goetter v. Pickett*, 61 Ala. 387; *Strohn v. Detroit, etc., R. Co.*, 21 Wis. 554, 94 Am. Dec. 554; *Gott v. Dinsmore*, 111 Mass. 45, the rule applies although the shipper had formerly been the agent of the carrier, and knew that receipts given for goods always contained a limitation of the carrier's liability.

11. *Wilde v. Merchants' Despatch Transp. Co.*, 47 Iowa, 272.

12. *Wallingford v. Columbia, etc., R. Co.*, 26 S. C. 258.

§ 13. Contract must be legible and intelligible.

Where there is nothing in the nature of the transaction, or the custom of trade, which should necessarily charge the shipper with knowledge that he was receiving and accepting the written evidence of a contract, a receipt, obscurely printed in fine type, delivered in a dimly lighted car in which it was difficult to read the limitations contained in the receipt, although a direction to read them was legible, has been held not to be binding as to the limitations therein contained on the shipper, because of the lack of the requisite evidence of the shipper's assent to the contract.¹³ So, where a receipt contained a printed clause limiting the carrier's liability for goods transported by it, but over part of this clause in the receipt, a stamp was pasted so as to render it unintelligible, it was held insufficient to warrant a finding that the shipper assented to any limitation of the carrier's liability.¹⁴

§ 14. By what law validity of contract is determined.

A contract of affreightment made in one country or State between citizens or residents thereof, and the performance of which begins there must be governed as to the validity, the nature, the obligation, and the interpretation thereof by the law of that country or State, unless the parties, when entering into the contract, clearly manifest a mutual intention that it shall be governed by the law of some other country or State, or unless there is something to show that the intention of the parties was that the law of the State or government where the contract is to be performed

13. *Blossom v. Dodd*, 43 N. Y. 264, 3 Am. Rep. 701; *Madan v. Sherard*, 73 N. Y. 329, 29 Am. Rep. 153. These were cases of local express companies receiving baggage from travelers for transportation to their immediate destination. In the latter case the question as to whether the delivery of the receipt under the circumstances created a contract according to its terms was held to be one

for the jury. See, also, *Rawson v. Pennsylvania R. Co.*, 48 N. Y. 216; *Isaacson v. New York, etc., R. Co.*, 94 N. Y. 286; *Westcott v. Fargo*, 63 Barb. (N. Y.) 354; *Coffin v. New York Cent. R. Co.*, 64 Barb. (N. Y.) 391; *Kerr v. Liverpool, etc., R. Co.*, 12 Wklv. Dig. (N. Y.) 265.

14. *Perry v. Thompson*, 98 Mass. 249.

should prevail; and then, in conformity to the presumed intention of the parties, the law of the place of performance governs.¹⁵ A

15. *Liverpool, etc., Steam Co. v. Phoenix Ins. Co.*, 129 U. S. 397, 32 L. Ed. 788, 39 Alb. L. J. 373, 5 R. R. & Corp. L. J. 435, 9 Sup. Ct. Rep. 469, 37 Am. & Eng. R. Cas. 699, where a contract was made in New York for shipment of goods on a British vessel, that the goods shipped were to be delivered by a carrier at Liverpool, and the freight and primage were payable there in sterling currency, and that the vessel was stranded on the coast of Great Britain, do not make the contract an English contract or refer to the English law the question of the liability of the carrier for the negligence of the master and the crew in the course of the voyage. See also *China Mut. Ins. Co. v. Force*, 142 N. Y. 90-100, 36 N. E. 874; *Robertson v. National Steamship Co.*, 1 App. Div. (N. Y.) 61, 37 N. Y. Supp. 68; *Armour v. Michigan Cent. R. Co.*, 65 N. Y. 111, 22 Am. Rep. 603; *Dyke v. Erie R. Co.*, 45 N. Y. 113, 6 Am. Rep. 43; *Fairchild v. Philadelphia, etc., R. Co.*, 148 Pa. St. 527; *Cantu v. Bennett*, 39 Tex. 303; *Ryan v. Missouri, etc., R. Co.*, 65 Tex. 13, 57 Am. Rep. 589, 23 Am. & Eng. R. Cas. 703; *Palmer v. Atchison, etc., R. Co.*, 101 Cal. 187, 61 Am. & Eng. R. Cas. 241; *Hale v. New Jersey Steam Nav. Co.*, 15 Conn. 539, 39 Am. Dec. 398; *Western, etc., R. Co. v. Exposition Cotton Mills*, 81 Ga. 522, 35 Am. & Eng. R. Cas. 602; *Wald v. Pittsburg, etc., R. Co.*, 60 Ill. App. 460; *Fonseca v. Cunard Steamship Co.*, 153 Mass. 553; *The Carib Prince*, 63 Fed. 266.

Contract for through shipment.—

A provision in a bill of lading of goods to be shipped from Texas to another State, that the carrier shall not be liable for loss by fire is valid notwithstanding a Texas statute making a stipulation of that character void, as that statute does not apply to interstate or foreign commerce. *Otis Co. v. Missouri Pac. R. Co.*, 112 Mo. 623, 55 Am. & Eng. R. Cas. 636; *Missouri Pac. R. Co. v. Sherwood*, 84 Tex. 125, 19 S. W. 455.

A State statute making it unlawful for a carrier to limit his common law liability to deliver property received for transportation will not control a contract made in another State contemplating a thorough carriage to a third State, although the carrier is incorporated in the first State. *Thomas v. Wabash, etc., R. Co.*, 63 Fed. 200, 4 Inters. Com. Rep. 802.

The presumption that a contract for shipment, made with plaintiffs by defendant carrier in Massachusetts, was intended to be governed by its laws, by which the clause exempting the carrier from liability is void, is not overcome by the fact that defendant was a New York corporation, and plaintiffs residents of New York, and that the stock shipped was to be delivered in New York, especially where, indorsed on the contract, there was a provision, exempting the carrier from liability for injury to the persons accompanying the stock, which expressly provided that any question arising thereunder should be determined by the laws of New York. *Grand v. Livingston*, 4 App. Div. (N. Y.) 589, 38 N. Y. Supp. 490.

contract made in one State to be performed partly in that State and partly in another State, being void under the laws of the State where made, will not be enforced in the other State, though valid under the law of the other State wherein it is to be partly performed,¹⁶ and where valid in the State where made, will be binding in the other State, although void under the statute there.¹⁷ Contracts which are to be partly performed in the State where they are made and entered into are governed by the laws of such State, although they are to be partly performed in another State.¹⁸ When a contract is made in one country or State, to be wholly performed in another, its validity is to be determined by the law

16. *Pittman v. Pacific Express Co.* (Tex. Civ. App.), 59 S. W. 949; *McDaniel v. Chicago, etc., R. Co.*, 24 Iowa, 412. See also *Hartman v. Louisville, etc., R. Co.*, 39 Mo. App. 88; *Robinson v. Merchants' Despatch Transp. Co.*, 45 Iowa, 470.

17. *Hazel v. Chicago, etc., R. Co.*, 82 Iowa, 477, 49 Am. & Eng. R. Cas. 78; *Talbott v. Merchants' Despatch Transp. Co.*, 41 Iowa, 247, 20 Am. Rep. 589; *International, etc., R. Co. v. Moody*, 71 Tex. 614, the burden of proof is on the carrier to show that the stipulation was valid under the laws of the State where made.

But this rule does not operate to render invalid a contract for interstate shipment which is contrary to the laws of the State where it was made, where such laws rendering it invalid are themselves invalid, as an interference with the exclusive power of congress over interstate commerce. *Carton v. Illinois Cent. R. Co.*, 59 Iowa, 148, 44 Am. Rep. 672, 6 Am. & Eng. R. Cas. 305; *Texas, etc., R. Co. v. Richmond* (Tex. Civ. App.), 63 S. W. 619.

18. *Cleveland, etc., R. Co. v. Dru-
ien*, 26 Ky. Law Rep. 103, 80 S. W. 778; *Merchants' Despatch Transp. Co. v. Furthman*, 149 Ill. 66, 66 Am. & Eng. R. Cas. 145; *Michigan Cent. R. Co. v. Boyd*, 91 Ill. 268; *Forepaugh v. Delaware, etc., R. Co.*, 128 Pa. St. 217, 15 Am. St. Rep. 672, 40 Am. & Eng. R. Cas. 78; *Brooke v. New York, etc., R. Co.*, 108 Pa. St. 530, 56 Am. Rep. 235, 21 Am. & Eng. R. Cas. 64; *Milwaukee, etc., R. Co. v. Smith*, 74 Ill. 197; *Coup v. Wabash, etc., R. Co.*, 56 Mich. 111, 56 Am. Rep. 374, 18 Am. & Eng. R. Cas. 542; *Hale v. New Jersey Steam Nav. Co.*, 15 Conn. 539, 39 Am. Dec. 398; *Atlanta, etc., R. Co. v. Tanner*, 68 Ga. 390; *Atchison, etc., R. Co. v. Moore*, 29 Kans. 632, 11 Am. & Eng. R. Cas. 243; *McMaster v. Illinois Cent. R. Co.*, 65 Miss. 271, 7 Am. St. Rep. 653; *Knowlton v. Erie R. Co.*, 19 Ohio St. 260, 2 Am. Rep. 395; *Bridges v. Ashville, etc., R. Co.*, 27 S. C. 462, 13 Am. St. Rep. 653; *Pennsylvania Co. v. Fairchild*, 69 Ill. 260.

of the place of performance, unless the contract expressly provide otherwise.¹⁹ The Federal courts have refused to follow or be bound by the decisions of the State courts in determining the validity of such contracts and other questions of unwritten commercial law, but hold that there is a general commercial law, of the United States, of which any local decision is but the evidence, and that the Federal courts will not follow such local decision if they consider it wrong, but will follow the rules laid down by Federal tribunals, or exercise their own judgment where the question is a new one, even when their jurisdiction attaches only by reason of the citizenship of the parties, in an action at law of which the courts of the State have concurrent jurisdiction, and upon a contract made and to be performed within the State.²⁰ An express stipulation by any common carrier for hire, in a contract of carriage, that it shall be exempt from liability for losses

19. *Curtis v. Delaware, etc., R. Co.*, 74 N. Y. 116; *Dyke v. Erie R. Co.*, 45 N. Y. 113, 6 Am. Rep. 43; *Burekle v. Eckhart*, 3 N. Y. 132; *Pritchard v. Norton*, 106 U. S. 124; *Junction Railroad Co. v. Bank of Ashland*, 12 Wall. (U. S.) 226; *Osgood v. Bauder*, 75 Iowa, 550, 39 N. W. 887.

The rule that the place of performance of a contract gives the law of its performance was applied in an action brought in Pennsylvania by a passenger against a New Jersey railroad corporation, for the loss of his trunk, and it was held that it made no difference that the undertaking was in part to carry the baggage across the Delaware river, as the inhabitants of both States have equal rights of navigation and passage on that stream. *Brown v. Camden, etc., R. Co.*, 83 Pa. St. 316.

But a contract limiting the carrier's common law liability, void by

the statute of the State where the contract was made, even though it was interstate in character was held to be void, although the contract was to be performed in another State, in the absence of evidence as to the law of the State where the contract was to be performed, the law there being presumed to be the same as in the State where the contract was made. *Texas, etc., R. Co. v. Richmond* (Tex. Civ. App.), 63 S. W. 619, revg. 61 S. W. 410. See also *Southern Pac. Co. v. Anderson* (Tex. Civ. App.), 63 S. W. 1023.

20. *Liverpool, etc., Steam Co. v. Phoenix Ins. Co.*, 129 U. S. 397, 37 Am. & Eng. R. Cas. 688; *Myrick v. Michigan Cent. R. Co.*, 107 U. S. 102, 9 Am. & Eng. R. Cas. 25; *Bucher v. Cheshire R. Co.*, 125 U. S. 555, 34 Am. & Eng. R. Cas. 389; *Eells v. St. Louis, etc., R. Co.*, 52 Fed. 903, 55 Am. & Eng. R. Cas. 341; *Swift v. Tyson*, 16 Pet. (U. S.) 1.

caused by the negligence of itself or its servants, is held in the Federal courts, to be unreasonable and contrary to public policy, and consequently void, and will not be enforced by such tribunals although it may be valid under the law of the State where it was made.²¹ In some of the State courts and in the English courts it is held, on the contrary, that such stipulations, although void under the law of their State or country, are not immoral, and will be given effect, if it appears that they were made in another State or country where such contracts are valid.²² Whether or not a special contract existed has been held to be a question affecting only the shipper's remedy and, therefore, to be governed by the law of the place where the action is brought.²³ Where the action against a carrier is not based on any special contract and such a contract is not set up or involved in the action but arises from the contract and duties resulting therefrom under the common law, the right of the shipper to recover for loss or damage is to be governed by the law of the place where the loss or damage occurred, and any limitation placed by the law of a particular State upon the extent of the recovery for a breach of such a contract, or for a tort committed in violation of it, is not applicable in a suit brought in another State.²⁴

21. *Liverpool, etc., Steam Co. v. Phoenix Ins. Co.*, *supra*; *Inman v. South Carolina, etc., R. Co.*, 129 U. S. 128, 32 L. Ed. 612, 5 R. R. & Corp. L. J. 271; *Lewisohn v. National Steamship Co.*, 56 Fed. 602; *The Guildhall*, 58 Fed. 796; *The Hugo*, 57 Fed. 403; *The Brantford City*, 29 Fed. 373.

22. *O'Regan v. Cunard Steamship Co.*, 160 Mass. 356; *Fonseca v. Cunard Steamship Co.*, 153 Mass. 553, 25 Am. St. Rep. 669; *In re Missouri Steamship Co.*, L. R. 42 Ch. Div. 321.

23. *Hoadley v. Northern Transp. Co.*, 115 Mass. 304, 15 Am. Rep. 106.

24. *Lyon v. Erie R. Co.*, 57 N. Y. 489; *Dyke v. Erie R. Co.*, 45 N. Y. 113, 6 Am. Rep. 43; *Pomeroy v. Ainsworth*, 22 Barb. (N. Y.) 118; *Pope v. Nickerson*, 3 Story (U. S.), 485; *Gray v. Jackson*, 51 N. H. 9, 12 Am. Rep. 1; *Barter v. Wheeler*, 49 N. H. 9, 6 Am. Rep. 434; *Little v. Riley*, 43 N. H. 109; *Knowlton v. Erie R. Co.*, 19 Ohio St. 260, 2 Am. Rep. 305; *Brown v. Camden, etc., R. Co.*, 83 Pa. St. 316; *Springs v. South Bound R. Co.*, 46 S. C. 104; *Bridges v. Ashville, etc., R. Co.*, 27 S. C. 462, 13 Am. St. Rep. 653.

§ 15. Who may make special contract.

A consignor of goods has power to contract for their carriage and bind the consignee.²⁵ A shipping contract limiting the liability of a carrier is binding upon the consignor who delivers his goods by his agent to the carrier for shipment, where the agent to make the shipment assents to the stipulations limiting liability or accepts a receipt or bill of lading containing such stipulations in the usual course of business.²⁶ But while, ordinarily, a person authorized to deliver and delivering the property of another to a common carrier for shipment may be by the latter treated as having authority to stipulate for and accept the terms of affreightment, and as against the carrier the owner is bound by them, he is not necessarily charged with any of the terms and conditions of the bills of lading other than those which the carrier is at liberty to treat as within the authority of the person receiving them to accept in behalf of the owners of the property.²⁷ Where a carrier accepts goods for carriage to a place beyond the terminus of its route, being bound to deliver them at the end of its route to the next succeeding carrier, it is authorized to make such delivery upon the usual contract required by the latter, although under such

25. *Nelson v. Hudson River R. Co.*, 48 N. Y. 498; *Fills v. Michigan Cent. R. Co.*, 45 N. Y. 622, 6 Am. Rep. 152.

26. *Zimmer v. New York Cent., etc., R. Co.*, 137 N. Y. 460; *Shelton v. Merchants' Despatch Transp. Co.*, 59 N. Y. 258; *Squire v. New York Cent., R. Co.*, 98 Mass. 239, 93 Am. Dec. 162; *Hill v. Boston, etc., R. Co.*, 144 Mass. 284, 28 Am. & Eng. R. Cas. 89; *Smith v. Southern Express Co.*, 104 Ala. 387; *Illinois Cent. R. Co. v. Morrison*, 19 Ill. 136; *Ryan v. Missouri, etc., R. Co.*, 65 Tex. 13, 57 Am. Rep. 589; *Lewis v. Great Western R. Co.*, 5 H. & N. 867; *Van Schaack v. Northern Transp. Co.*, 3 Biss. (U. S.) 394.

27. *Jennings v. Grand Trunk R. Co.*, 127 N. Y. 438, 49 Am. & Eng. R. Cas. 98; *Coffin v. New York Cent., etc., R. Co.*, 64 Barb. (N. Y.) 379, 56 N. Y. 632; *Bostwick v. Baltimore, etc., R. Co.*, 45 N. Y. 712; *Germania Fire Ins. Co. v. Memphis, etc., R. Co.*, 72 N. Y. 90; *Guillame v. General Transp. Co.*, 100 N. Y. 491; *Swift v. Pacific Mail, etc., Co.*, 106 N. Y. 206; *Park v. Preston*, 108 N. Y. 434; *London, etc., R. Co. v. Bartlett*, 7 H. & N. 400; *Seller v. Steamship Pacific*, 1 Or. 409; *Hayn v. Campbell* 63 Cal. 143; *Ohio, etc., R. Co. v. Hamlin*, 42 Ill. App. 441; *Illinois Cent. R. Co. v. Morrison*, 19 Ill. 139.

contract the latter would be exempted from liability, and the consignor would be bound by its act in so doing.²⁸ General authority to a consignor to deliver goods to a carrier for transportation includes power to contract for the terms of transportation and to agree on exemptions from liability, and the consignor's authority to enter into special contracts with the carrier, binding on the consignee, is to be presumed; the carrier need not inquire into it.²⁹ In the absence of actual notice of the fact that the consignor has exceeded his authority from the consignee, the carrier cannot be made liable.³⁰ But the consignor, in an action against the carrier, is not bound by a special contract limiting liability made by the consignee with the carrier, unless it is shown that he had notice of the consignee's contract for carriage.³¹

§ 16. Carrier may not limit its liability for negligence.

The doctrine is established by the great weight of authority in this country that a carrier cannot by stipulation or contract relieve or exempt itself from liability for losses or injuries caused by its own negligence or want of care and skill, or that of its servants, or by its own or their wilful default, misfeasance or tort. Public policy and every consideration of right and justice, it is held, de-

28. *Rawson v. Holland*, 59 N. Y. 611, 17 Am. Rep. 394. Compare *Merchants' Wharf-Boat Assoc. v. Wood*, 64 Miss. 661, 3 So. 248.

29. *Shelton v. Merchants' Despatch Transp. Co.*, *supra*; *Mills v. Michigan Cent. R. Co.*, *supra*; *Brown v. Louisville, etc., R. Co.*, 36 Ill. App. 140; *McMillan v. Michigan Southern, etc., R. Co.*, 16 Mich. 79, 93 Am. Dec. 208; *Squire v. New York Cent., etc., R. Co.*, *supra*; *Craycroft v. Atchison, etc., R. Co.*, 18 Mo. App. 487; *Southern Pac. R. Co. v. Maddox*, 75 Tex. 309; *Ryan v. Missouri, etc., R. Co.*, *supra*; *York Co. v. Illinois Cent. R. Co.*, 3 Wall. (U. S.) 107; *New Jer-*

sey Steam Nav. Co. v. Merchants' Bank, 6 How. (U. S.) 344; *Robinson v. Merchants' Despatch Transp. Co.*, 45 Iowa, 470; *Christenson v. American Express Co.*, 15 Minn. 270, 2 Am. Rep. 122; *Barnett v. London, etc., R. Co.*, 5 H. & N. 604.

30. *Meyer v. Harnden's Express Co.*, 24 How. Pr. (N. Y.) 290; *Moriarity v. Harnden's Express Co.*, 1 Daly (N. Y.) 227; *Knell v. United States, etc. S. Co.*, 1 J. & S. (N. Y.) 423; *Briggs v. Boston, etc., R. Co.*, 6 Allen (Mass.), 246, 83 Am. Dec. 626.

31. *White v. Goodrich Transp. Co.*, 46 Wis. 493, 21 Am. Ry. Rep. 398.

mands that the right of the owners to absolute security against the negligence of the carrier, and of all persons engaged in performing its duty, shall not be taken away by any reservation in its receipt, or by any arrangement, contract or stipulation entered into. Such contracts are, therefore, declared to be void as being unreasonable and contrary to public policy and afford no protection to the carrier.³² A carrier cannot limit its liability for

32. U. S.—*Liverpool, etc., Co. v. Phoenix Ins. Co.*, 129 U. S. 397, 32 L. Ed. 788, 5 R. R. & Corp. L. J. 435, 39 Alb. L. J. 373, 9 Sup. Ct. Rep. 469; *Inman v. South Carolina R. Co.*, 129 U. S. 128, 32 L. Ed. 612, 5 R. R. & Corp. L. J. 271, 9 Sup. Ct. Rep. 249; *Phoenix Ins. Co. v. Erie, etc., Transp. Co.*, 117 U. S. 312; *Oscanyan v. Winchester Repeating Arms Co.*, 103 U. S. 261; *The Guildhall*, 58 Fed. 796, 2 McCrary (U. S.), 48; *Scruggs v. Baltimore, etc., R. Co.*, 18 Fed. 318, 5 McCrary (U. S.), 590; *Nelson v. National Steamship Co.*, 7 Ben. (U. S.) 340; *The Iowa*, 50 Fed. 561; *Rintoul v. New York Cent., etc., R. Co.*, 17 Fed. 905, 16 Am. & Eng. R. Cas. 144; *Thomas v. Lancaster Mills*, 71 Fed. 481, 34 U. S. App. 404; *Bells v. St. Louis, etc., R. Co.*, 52 Fed. 903; *Kuter v. Michigan Cent. R. Co.*, 1 Biss. (U. S.) 35; *Woodburn v. Cincinnati, etc., R. Co.*, 40 Fed. 731, 42 Am. & Eng. R. Cas. 514; *Woodward v. Illinois Cent. R. Co.*, 1 Biss. (U. S.) 447. See also cases cited note 1, § 1, ante.

Ala.—*Louisville, etc., R. Co. v. Sherrod*, 84 Ala. 178, 4 So. 29; *Alabama, etc., R. Co. v. Little*, 71 Ala. 611, 12 Am. Eng. R. Cas. 37; *East Tennessee, etc., R. Co. v. Johnston*, 75 Ala. 596, 51 Am. Rep. 489, 22 Am. & Eng. R. Cas. 437; *Central, etc., R.*

Co. v. Smitha, 85 Ala. 47; *Alabama, etc., R. Co. v. Thomas*, 89 Ala. 294, 18 Am. St. Rep. 119; *Louisville, etc., R. Co. v. Grant*, 99 Ala. 325; *Montgomery, etc. R. Co. v. Edmonds*, 41 Ala. 667; *Mobile, etc., R. Co. v. Jarboe*, 41 Ala. 644; *Steel v. Townsend*, 37 Ala. 247, 79 Am. Dec. 49; *Alabama, etc., R. Co. v. Thomas*, 83 Ala. 343, 3 So. 802.

Ark.—*St. Louis, etc., R. Co. v. Lesser*, 46 Ark. 236.

Cal.—*Hooper v. Wells*, 27 Cal. 11, 85 Am. Dec. 211.

Colo.—*Union Pac. R. Co. v. Rainey*, 19 Colo. 225; *Milton v. Denver, etc., R. Co.*, 1 Colo. App. 307.

Conn.—See cases cited note 1, § 1, ante.

Dak.—*Hartwell v. Northern Pac. R. Co.*, 5 Dak. 463; *Hazel v. Chicago, etc., R. Co.*, 82 Iowa, 477, 49 Am. & Eng. R. Cas. 76.

Del.—*Truax v. Philadelphia, etc., R. Co.*, 3 Houst. (Del.) 233; *Flinn v. Philadelphia, etc., R. Co.*, 1 Houst. (Del.) 169.

Fla.—*Brock v. Gale*, 14 Fla. 523, 14 Am. Rep. 356.

Ga.—*Nicoll v. East Tennessee, etc., R. Co.*, 89 Ga. 260; *Central R. Co. v. Bryant*, 73 Ga. 722; *Bryant v. Southwestern R. Co.*, 68 Ga. 805, 6 Am. & Eng. R. Cas. 388; *Mitchell v. Georgia R. Co.*, 68 Ga. 644; *Georgia R. Co. v.*

the negligence of its employes by stipulating that those furnished

Spears, 66 Ga. 485, 42 Am. Rep. 81; Georgia R. Co. v. Beatie, 66 Ga. 438, 42 Am. Rep. 75.

Ill.—United States Express Co. v. Council, 84 Ill. App. 491, Merchants' etc., Transp. Co. v. Leysor, 89 Ill. 43; Merchants', etc., Transp. Co. v. Josting, 89 Ill. 152; American Express Co. v. Spellman, 90 Ill. 195; Erie R. Co. v. Wilcox, 84 Ill. 239; Boscowitz v. Adams Express Co., 93 Ill. 523, 5 Cent. L. J. 58; Adams Express Co. v. Stettaners, 61 Ill. 184; Erie, etc., Transp. Co. v. Dater, 8 Cent. L. J. 293, 91 Ill. 195; Merchants', etc., Transp. Co. v. Theilbar, 86 Ill. 71; Chicago, etc., R. Co. v. Montfort, 60 Ill. 175; Illinois Cent. R. Co. v. Sauper, 38 Ill. 354.

Ind.—Parrill v. Cleveland, etc., R. Co., 23 Ind. App. 638, 55 N. E. 1026; Terre Haute, etc., R. Co. v. Sherwood, 132 Ind. 129; Indianapolis, etc., R. Co. v. Forsythe, 4 Ind. App. 326; Michigan Southern, etc., R. Co. v. Heaton, 37 Ind. 448, 10 Am. Rep. 89; Indianapolis, etc., R. Co. v. Allen, 31 Ind. 394; Adams Express Co. v. Harris, 120 Ind. 73, 16 Am. St. Rep. 315, 40 Am. & Eng. R. Cas. 153; Baltimore, etc., R. Co. v. Ragsdale, 14 Ind. App. 406; Lake Shore, etc., R. Co. v. Bennett, 89 Ind. 457, 6 Am. & Eng. R. Cas. 391; St. Louis, etc., R. Co. v. Smuck, 49 Ind. 302; Ohio, etc., R. Co. v. Selby, 47 Ind. 471, 17 Am. Rep. 719; Adams Express Co. v. Fendrick, 38 Ind. 150; Adams Express Co. v. Reagan, 29 Ind. 21, 92 Am. Dec. 332; Wright v. Gaff, 6 Ind. 416.

Iowa.—Hart v. Chicago, etc., R. Co., 69 Iowa, 485; McCune v. Burlington, etc., R. Co., 52 Iowa, 670; Brush v. Sabula, etc., R. Co., 43 Iowa, 554; Mulligan v. Illinois Cent. R. Co.,

36 Iowa, 181; Thompson v. Chicago, etc., R. Co., 27 Iowa, 561; Griswold v. Illinois Cent. R. Co., 90 Iowa, 265. See Iowa Code and Statutes.

Kan.—Missouri Valley R. Co. v. Caldwell, 8 Kan. 244, 5 Am. Ry. Rep. 287; Sprague v. Missouri Pac. R. Co., 34 Kan. 347, 23 Am. & Eng. R. Cas. 684; Kansas City, etc., R. Co. v. Simpson, 30 Kan. 645, 46 Am. Rep. 104; Kansas Pac. R. Co. v. Peavey, 29 Kan. 169, 44 Am. Rep. 630; Leavenworth, etc., R. Co. v. Maris, 16 Kan. 333; St. Louis, etc., R. Co. v. Piper, 13 Kan. 505; Goggin v. Kansas Pac. R. Co., 12 Kan. 416; Kallman v. U. S. Express Co., 3 Kan. 205.

Ky.—Louisville, etc., R. Co. v. Plummer (Ky.), 35 S. W. 1113; Louisville, etc., R. Co. v. Owen, 93 Ky. 201; Baughman v. Louisville, etc., R. Co., 94 Ky. 150; Louisville, etc., R. Co. v. Brownlee, 14 Bush (Ky.), 590; Louisville, etc., R. Co. v. Hedger, 9 Bush (Ky.), 645, 15 Am. Rep. 740; Adams Express Co. v. Guthrie, 9 Bush (Ky.), 78; Reno v. Hogan, 12 B. Mon. (Ky.), 63, 54 Am. Dec. 513; Adams Express Co. v. Nock, 2 Duv. (Ky.) 562, 87 Am. Dec. 510.

La.—Maxwell v. Southern Pac. R. Co., 48 La. Ann. 385; Higgins v. New Orleans, etc., R. Co., 28 La. Ann. 133; New Orleans Mut. Ins. Co. v. New Orleans, etc., R. Co., 20 La. Ann. 302; Roberts v. Riley, 15 La. Ann. 103, 77 Am. Dec. 183; Baldwin v. Collins, 9 Rob. (La.) 468.

Me.—Fillebrown v. Grand Trunk R. Co., 55 Me. 462, 92 Am. Dec. 606; Stone v. Waitt, 31 Me. 499, 52 Am. Dec. 621; Sager v. Portsmouth, etc., R. Co., 31 Me. 228, 50 Am. Dec. 659.

Md.—In this State it has been held that the right of common carriers to

to assist the shipper in loading and unloading freight shall be

limit their common law liability by express contract, whenever there is reason and justice to sustain the limitation, is too well established to be questioned. But the contract ought to be in clear and distinct terms. *McCoy v. Erie, etc., Transp. Co.*, 42 Md. 498; *Bankard v. Baltimore, etc., R. Co.*, 34 Md. 197, 6 Am. Rep. 321; *Brehme v. Adams Express Co.*, 25 Md. 328; *Baltimore, etc., R. Co. v. Brady*, 32 Md. 333.

Mich.—The limitation may be made by special contract, but not by general notice. *Feige v. Michigan Cent. R. Co.*, 62 Mich. 1; *Smith v. American Express Co. (Mich.)*, 66 N. W. 479; *Coup v. Wabash, etc., R. Co.*, 56 Mich. 111, 56 Am. Rep. 374, 18 Am. & Eng. R. Cas. 542; *Sisson v. Cleveland, etc., R. Co.*, 14 Mich. 489, 90 Am. Dec. 252; *Great Western R. Co. v. Hawkins*, 18 Mich. 427; *Hawkins v. Great Western R. Co.*, 17 Mich. 57, 97 Am. Dec. 179; *McMillan v. Michigan Southern, etc., R. Co.*, 16 Mich. 79, 93 Am. Dec. 208; *Michigan Cent. R. Co. v. Hale*, 6 Mich. 243. *Compare Michigan Cent. R. Co. v. Ward*, 2 Mich. 538. See also Michigan statutes.

A contract between a railroad and a shipper by which the railroad builds a side track for the shipper's convenience, and the shipper agrees to indemnify the railroad from all liability for loss by fire, though caused by the railroad's negligence, is not against public policy, as, in putting in such tracks, the railroad is not acting as a common carrier. *Mann v. Pere Marquette R. Co.*

(*Mich.*), 97 N. W. 721, 10 Det. L. N. 764.

Minn.—*Hutchinson v. Chicago, etc., R. Co.*, 37 Minn. 524, 35 N. W. 433; *Boehl v. Chicago, etc., R. Co.*, 44 Minn. 191; *Ortt v. Minneapolis, etc., R. Co.*, 36 Minn. 396; *Moulton v. St. Paul, etc., R. Co.*, 31 Minn. 85, 12 Am. & Eng. R. Cas. 13, 47 Am. Rep. 781; *Shriver v. Sioux City, etc., R. Co.*, 24 Minn. 506, 31 Am. Rep. 353; *Christenson v. American Express Co.*, 15 Minn. 270, 2 Am. Rep. 122.

Miss.—*Illinois Cent. R. Co. v. Bogard (Miss.)*, 27 So. 879; *Johnson v. Alabama, etc., R. Co.*, 69 Miss. 191, 30 Am. St. Rep. 534; *Chicago, etc., R. Co. v. Moss*, 60 Miss. 1003, 45 Am. Rep. 428, 21 Am. & Eng. R. Cas. 98; *New Orleans, etc., R. Co. v. Faler*, 58 Miss. 911, 9 Am. & Eng. R. Cas. 96; *Illinois Cent. R. Co. v. Scruggs*, 69 Miss. 418; *Chicago, etc., R. Co. v. Abels*, 60 Miss. 1017, 21 Am. & Eng. R. Cas. 105; *Mobile, etc., R. Co. v. Franks*, 41 Miss. 494; *Southern Express Co. v. Moon*, 39 Miss. 822.

Mo.—*D. Klass Commission Co. v. Wabash R. Co.*, 80 Mo. App. 164, 2 Mo. App. Rep. 545; *Witting v. St. Louis, etc., R. Co.*, 101 Mo. 631, 20 Am. St. Rep. 636, 45 Am. & Eng. R. Cas. 369, 28 Mo. App. 103; *Vaughn v. Wabash R. Co.*, 62 Mo. App. 461; *Leonard v. Chicago, etc., R. Co.*, 54 Mo. App. 293; *Doan v. St. Louis, etc., R. Co.*, 38 Mo. App. 408; *Hick v. Missouri Pac. R. Co.*, 51 Mo. App. 532; *McFadden v. Missouri Pac. R. Co.*, 92 Mo. 343, 1 Am. St. Rep. 721, 30 Am. & Eng. R. Cas. 17; *Potts v. Wabash, etc., R. Co.*, 17 Mo. App.

the employes of the latter.³³ A shipping receipt that goods are

394; *Drew v. Red Line Transit Co.*, 3 Mo. App. 495; *Kirby v. Adams Express Co.*, 2 Mo. App. 369, 3 Cent. L. J. 435; *Dawson v. Chicago, etc., R. Co.*, 79 Mo. 296, 18 Am. & Eng. R. Cas. 521; *St. Louis, etc., R. Co. v. Cleary*, 77 Mo. 634, 46 Am. Rep. 13, 16 Am. & Eng. R. Cas. 122; *Read v. St. Louis, etc., R. Co.*, 60 Mo. 199; *Sturgeon v. St. Louis, etc., R. Co.*, 65 Mo. 569; *Snider v. Adams Express Co.*, 63 Mo. 376; *Rice v. Kansas Pac. R. Co.*, 63 Mo. 413; *Ketchum v. American Merchants' U. Exp. Co.*, 52 Mo. 390; *Wolf v. American Express Co.*, 43 Mo. 421, 97 Am. Dec. 406; *Levering v. Union Transp., etc., Co.*, 42 Mo. 88, 97 Am. Dec. 320.

But a contract, fairly entered into, limiting a right of recovery to a sum expressly agreed upon by the parties as representing the true value of the property shipped, is not a contract exempting the carrier in any degree from the consequences of its own negligence, but simply fixes the rate of freight and liquidates the damages. *Harvey v. Terre Haute, etc., R. Co.*, 74 Mo. 541, 6 Am. & Eng. R. Cas. 293; *Ball v. Wabash, etc., R. Co.*, 83 Mo. 574, 25 Am. & Eng. R. Cas. 384.

Neb.—*Pennsylvania Co. v. Kennard Glass & Paint Co.* (Neb.), 81 N. W. 372; *Atchison, etc., R. Co. v. Lawler*, 40 Neb. 356, 61 Am. & Eng. R. Cas. 255; *St. Joseph, etc., R. Co. v. Palmer*, 38 Neb. 463, 61 Am. & Eng. R. Cas. 69; *Chicago, etc., R. Co. v. Witty*, 32 Neb. 275, 29 Am. St. Rep. 436.

N. H.—*Barter v. Wheeler*, 49 N. H. 9, 6 Am. Rep. 434; *Moses v. Boston, etc., R. Co.*, 24 N. H. 71, 55 Am. Dec.

222. See also, *Merrill v. American Express Co.*, 62 N. H. 514.

N. J.—*Taylor v. Pennsylvania R. Co.*, 8 N. J. L. J. 149; *Paul v. Pennsylvania R. Co.* (N. J. Sup.), 57 Atl. 139; *Gibbons v. Wade*, 8 N. J. L. 255.

N. C.—*Parker v. Atlantic, etc., R. Co.*, 133 N. C. 335, 63 L. R. A. 827, 45 S. E. 658; *Gardner v. Southern R. Co.*, 127 N. C. 293, 37 S. E. 328; *Branch v. Wilmington, etc., R. Co.*, 88 N. C. 573, 18 Am. & Eng. R. Cas. 621; *Mason v. Richmond, etc., R. Co.*, 111 N. C. 482, 32 Am. St. Rep. 814, 53 Am. & Eng. R. Cas. 183; *Smith v. North Carolina R. Co.*, 64 N. C. 235.

Ohio.—*Pennsylvania R. Co. v. Yoder*, 25 Ohio C. C. R. 32; *Union Express Co. v. Graham*, 26 Ohio St. 595; *Knowlton v. Erie R. Co.*, 19 Ohio St. 260, 2 Am. Rep. 395; *Cleveland, etc., R. Co. v. Curran*, 19 Ohio St. 1, 2 Am. Rep. 362; *Jones v. Voorhees*, 10 Ohio, 145; *Welsh v. Pittsburgh, etc., R. Co.*, 10 Ohio St. 65; 75 Am. Dec. 490; *Graham v. Davis*, 4 Ohio St. 362, 62 Am. Dec. 285; *Davidson v. Graham*, 2 Ohio St. 131.

Or.—*Seller v. Steamship Pacific*, 1 Or. 409.

Pa.—*Willock v. Pennsylvania R. Co.*, 166 Pa. St. 184, 45 Am. St. Rep. 674, 35 W. N. C. (Pa.) 545; *Armstrong v. United States Express Co.*, 159 Pa. St. 640; *Buck v. Pennsylvania R. Co. v. Raiordon*, 119 Pa. St. Rep. 800; *Weiller v. Pennsylvania R. Co.*, 134 Pa. St. 310, 19 Am. St. Rep. 700, 42 Am. & Eng. R. Cas. 390; *Grogan v. Adams Express Co.*, 114 Pa. St. 523, 60 Am. Rep. 360, 30 Am. & Eng. R. Cas. 9; *Pennsyl-*

shipped "at owner's risk" exempts even connecting lines of road

vania R. Co., v. Raiordon, 119 Pa. St. 577, 4 Am. St. Rep. 670; Adams Express Co. v. Sharpless, 77 Pa. St. 516; Empire Transp. Co. v. Wamsutta Oil Refining, etc., Co., 63 Pa. St. 14, 3 Am. Rep. 515; American Express Co. v. Sands, 55 Pa. St. 140; Powell v. Pennsylvania R. Co., 32 Pa. St. 414, 75 Am. Dec. 564; Goldey v. Pennsylvania R. Co., 30 Pa. St. 242, 72 Am. Dec. 703; Camden, etc., R. Co. v. Baldauf, 16 Pa. St. 67, 55 Am. Dec. 481; Bingham v. Rogers, 6 W. & S. (Pa.) 495, 40 Am. Dec. 581; Beckman v. Shouse, 5 Rawle (Pa.), 179, 28 Am. Dec. 653; Atwood v. Reliance Transp. Co., 9 Watts (Pa.), 87, 34 Am. Dec. 503.

R. I.—Hubbard v. Harnden Express Co., 10 R. I. 244.

S. C.—Johnstone v. Richmond, etc., R. Co., 39 S. C. 55, 55 Am. & Eng. R. Cas. 346; Springs v. South Bound R. Co., 46 S. C. 104; Wallingford v. Columbia, etc., R. Co., 26 S. C. 258, 30 Am. & Eng. R. Cas. 44; Piedmont Mfg. Co. v. Columbia, etc., R. Co., 19 S. C. 353, 16 Am. & Eng. R. Cas. 194; Porter v. Southern Express Co., 4 S. C. 135, 16 Am. Rep. 762; Swindler v. Hilliard, 2 Rich. L. (S. C.) 286, 45 Am. Dec. 732; Patten v. Magrath, Dudley L. (S. C.) 159, 31 Am. Dec. 552.

Tenn.—Louisville, etc., R. Co. v. Sowell, 90 Tenn. 17, 49 Am. & Eng. R. Cas. 166; Deming v. Merchants Cotton Press, etc., Co., 90 Tenn. 306; Merchants', etc., Transp. Co. v. Bloch, 86 Tenn. 392, 6 Am. St. Rep. 847; Louisville, etc., R. Co. v. Wynn, 88 Tenn. 320, 45 Am. & Eng. R. Cas. 312; Nashville, etc., R. Co. v. Jack-

son, 6 Heisk. (Tenn.) 271; Southern Express Co. v. Womack, 1 Heisk. (Tenn.) 256; Olwell v. Adams Express Co., 1 Cent. L. J. 186; East Tennessee, etc., R. Co. v. Nelson, 1 Coldw. (Tenn.) 272; East Tennessee, etc., R. Co. v. Bromley, 5 Lea (Tenn.) 401; Texas, etc., R. Co. v. Rogers (Tenn.), 3 S. W. 660.

Tex.—The statutes of this state declare invalid any exceptions or special contract seeking to vary the common law liability of common carriers. Houston, etc., R. Co. v. Burke, 55 Tex. 323, 40 Am. Rep. 808, 9 Am. & Eng. R. Cas. 59; Gulf, etc., R. Co. v. Trawick, 68 Tex. 314, 2 Am. St. Rep. 494, 30 Am. & Eng. R. Cas. 49; Heaton v. Morgan's La., etc., S. Co., 1 Tex. App. Civ. Cas. § 774, 4 Tex. L. J. 375; New York Cent. R. Co. v. Lockwood, 17 Wall. (U. S.) 357; Arnold v. Jones, 26 Tex. 337, 82 Am. Dec. 617; Chevalier v. Strahan, 2 Tex. 115, 47 Am. Dec. 639; Galveston, etc., R. Co. v. Ball, 80 Tex. 602; Houston, etc., R. Co. v. Williams, (Tex. Civ. App.) 31 S. W. 559; Houston, etc., R. Co. v. Davis, 11 Tex. Civ. App. 24.

A carrier independently of the statute, cannot stipulate exemption from liability for losses resulting from its negligence. Gulf, etc., R. Co. v. Maetze, 2 Tex. App. Civ. Cas. § 631, 18 Am. & Eng. R. Cas. 613; Missouri Pac. R. Co. v. China Mfg. Co., 79 Tex. 26; Atchison, etc., R. Co. v. Grant, 6 Tex. Civ. App. 674; Gulf, etc., R. Co. v. Eddins, 7 Tex. Civ. App. 116; Gulf, etc., R. Co. v. Wilhelm, 3 Tex. App. Civ. Cas. § 458; Texas, etc., R. Co. v. Davis, 2 Tex. App. Civ. Cas. § 191;

from liability, save for the negligence of the party sought to be charged,³⁴ and the possession of such a receipt raises the presumption of the owner's assent to the risk.³⁵ But a common carrier is not released from damages occurring through its own negligence, by stipulating that the goods are shipped "at the owner's risk." At most this would only protect it against loss occurring from the ordinary and known risks of transportation.³⁶ It will not relieve from liability for delay in delivering goods.³⁷

§ 17. The New York rule.

In New York it was held in an early case that common carriers could not limit their liability, or evade the consequences of a

Missouri Pac. R. Co. v. Ivey, 71 Tex. 409, 10 Am. St. Rep. 758, 9 S. W. 346; *Missouri Pac. R. Co. v. Harris*, 67 Tex. 166, 28 Am. & Eng. R. Cas. 107; *Missouri Pac. R. Co. v. Cornwall*, 70 Tex. 611, 8 S. W. 312.

Vt.—*Davis v. Central Vermont R. Co.*, 66 Vt. 290, 44 Am. St. Rep. 852, 61 Am. & Eng. R. Cas. 197; *Cutts v. Brainard*, 42 Vt. 566, 1 Am. 353; *Mann v. Birchard*, 40 Vt. 326; *Farmers', etc., Bank v. Champlain Transp. Co.*, 18 Vt. 131, 23 Vt. 186, 56 Am. Dec. 68; *Blumenthal v. Brainard*, 38 Vt. 402, 91 Am. Dec. 350.

Va.—*Virginia, etc., R. Co. v. Sayers*, 26 Gratt. (Va.) 328.

W. Va.—*Baltimore, etc., R. Co. v. Rathbone*, 1 W. Va. 87, 88 Am. Dec. 664; *Baltimore, etc., R. Co. v. Skeels*, 3 W. Va. 556.

Wis.—*Ulman v. Chicago, etc., R. Co.*, 112 Wis. 168, 88 N. W. 41; *Cream City, etc., R. Co. v. Chicago, etc., R. Co.*, 21 Am. & Eng. R. Cas. 71; *Betts v. Farmers' Loan, etc., Co.*, 21 Wis. 80; *Boorman v. American Express Co.*, 21 Wis. 152; *Falvey v.*

Northern Transp. Co., 15 Wis. 129; *The Sultana v. Chapman*, 5 Wis. 454.

33. *Missouri Pac. R. Co. v. Smith (Tex.)*, 16 S. W. 803.

34. *Kiff v. Atchison, etc., R. Co.*, 32 Kan. 263, 18 Am. & Eng. R. Cas. 618. When the defense that the goods were carried at the owner's risk is interposed, a waiver of all other grounds of defense and an admission that the goods were damaged while in the possession of the carrier may be inferred. *South, etc., Alabama R. Co. v. Wilson*, 78 Ala. 587, 27 Am. & Eng. R. Cas. 41.

35. *Morrison v. Phillips, etc., Const. Co.*, 44 Wis. 405, 28 Am. Rep. 599, 19 Am. Ry. 312.

36. *Nashville, etc., R. Co. v. Johnson*, 6 Heisk. (Tenn.) 271, 12 Am. Ry. Rep. 54; *The Hugo*, 57 Fed. 403.

37. *Goldsmith v. Great Eastern R. Co.*, 44 L. T. N. S. 181, 29 W. R. 651; *Stevens v. Great Western R. Co.*, 52 L. T. 324; *D'Arc v. London, etc., R. Co.*, L. R. 9 C. P. 325, 22 W. R. 919, 30 L. T. N. S. 763; *Lewis v. Great Western R. Co.*, 26 W. R. 255.

breach of their legal duties as such, by an express agreement or special acceptance of the goods to be transported.³⁸ The ruling in this case was subsequently overruled and it became the doctrine of the courts of this State that it was competent for a common carrier and an owner of property, by an express agreement fairly entered into between themselves, to establish conditions of liability for loss or damage, different from those imposed by the common law.³⁹ Later the Court of Appeals of this State took the advanced ground that the power of the common carrier to limit its liability by special contract extends so far as to enable it to exonerate itself from the effects of any degree of negligence on the part of its servants, agents, or employes, even gross negligence, where the contract expressly provides for such exemption and where the contract is founded upon a valuable consideration, such as abatement in whole or in part of the ordinary freight rate, fare or charge.⁴⁰ Such contracts, however, are not favored by the courts, and a contract will not be construed as exempting from a liability for negligence, unless it is expressed in unequivocal terms; and every

38. *Gould v. Hill*, 2 Hill (N. Y.) 623.

39. *Parsons v. Monteath*, 13 Barb. (N. Y.) 353; *Moore v. Evans*, 14 Barb. (N. Y.) 524; *Dorr v. New Jersey Steam Nav. Co.*, 11 N. Y. 485, 62 Am. Dec. 125; *Stoddard v. Long Island R. Co.*, 5 Sandf. (N. Y.) 180.

40. *Wells v. New York Cent. R. Co.*, 24 N. Y. 181; *Perkins v. New York Cent. R. Co.*, 24 N. Y. 196, 83 Am. Dec. 282; *Bissell v. New York Cent. R. Co.*, 25 N. Y. 442, 82 Am. Dec. 369; *Nelson v. Hudson River R. Co.*, 48 N. Y. 498; *Guillaume v. Hamburgh, etc., Packet Co.*, 42 N. Y. 212, 1 Am. Rep. 512; *Westcott v. Fargo*, 63 Barb. (N. Y.) 349, 61 N. Y. 542, 19 Am. Rep. 300; *Poucher v. New York Cent. R. Co.*, 49 N. Y. 263, 10 Am. Rep. 364; *Nicholas v.*

New York Cent., etc., R. Co., 89 N. Y. 370, 9 Am. & Eng. R. Cas. 103; *Mynard v. Syracuse, etc., R. Co.*, 7 Hun (N. Y.) 399, 71 N. Y. 180, 27 Am. Rep. 28; *Heineman v. Grand Trunk R. Co.*, 31 How. Pr. (N. Y.) 430, 1 Sheld. (N. Y.) 95; *Wilson v. New York Cent., etc., R. Co.*, 97 N. Y. 87, where the contract provided that the carrier should not be liable for the negligence of its servants, and the validity of the exemption was sustained.

In *Cragin v. New York Cent. R. Co.*, 51 N. Y. 61, 10 Am. Rep. 559, 4 Am. Rey. Rep. 418, the contract expressly exempted the carrier from all liability, and this was held to cover a liability for the loss of certain live stock caused by negligence in failing to water them.

presumption is against such an intention. Thus, it has been held that a contract releasing the carrier "from damage or loss to any article from or by fire or explosion of any kind" does not release it from liability for damage by those means resulting from the carrier's own negligence.⁴¹ And exemption from damages occasioned by delays from any cause does not cover a loss by the negligent delay of the carrier.⁴² An exemption from all claims for any damage or injury "from whatsoever cause arising" does not include a loss arising from the carrier's negligence.⁴³ The doctrine of such contracts firmly established by the decisions of the courts of this State is that in order to secure to a common carrier immunity from its negligence or that of its servants, it must be so expressed in unmistakable language in the contract and it must not be left to a presumption to be drawn from the language. General words in the contract of a carrier, either of persons or of

41. *Steinweg v. Erie R. Co.*, 43 N. Y. 123, 3 Am. Rep. 673; *Holsapple v. Rome, etc., R. Co.*, 86 N. Y. 275; *Condict v. Grand Trunk R. Co.*, 54 N. Y. 500; *Rawson v. Holland*, 59 N. Y. 611, 17 Am. Rep. 394; *Alexander v. Green*, 7 Hill (N. Y.), 533; *Giles v. Fargo*, 60 N. Y. Super. Ct. 117; *Ghormley v. Dinsmore*, 51 N. Y. Super. Ct. 196; *Knell v. United States, etc., S. Co.*, 33 N. Y. Super. Ct. 423; *Prentice v. Decker*, 49 Barb. (N. Y.) 21.

But where the bill of lading contains a general exemption from liability for loss by fire, and the loss occurred from this cause, it is incumbent on the owner of the property, in order to avoid the effect of the exemption, to show that the fire was the result of the carrier's negligence or that the loss resulted from some breach of the carrier's duty. *Whitworth v. Erie R. Co.*, 87 N. Y.

419; *Van Akin v. Erie R. Co.*, 92 App. Div. (N. Y.) 23, 87 N. Y. Supp. 871.

So, a contract for the carriage of goods, providing that the carrier should not be liable for any loss or damage by change in weather, heat, frost, wet, or decay, did not relieve the carrier from liability for damage caused by negligence, but did impose on the owner the burden of establishing that injury from wet was caused by the carrier's negligence. *Thyll v. New York, etc., R. Co.*, 92 App. Div. (N. Y.) 513, 87 N. Y. Supp. 345, modg. 84 N. Y. Supp. 175.

42. *Nicholas v. New York, etc., R. Co.*, 89 N. Y. 370, 9 Am. & Eng. R. Cas. 103; *McKinney v. Jewett*, 90 N. Y. 267, 9 Am. & Eng. R. Cas. 209.

43. *Magnin v. Dinsmore*, 56 N. Y. 168; *Westcott v. Fargo*, 61 N. Y. 543; *Mynard v. Syracuse, etc., R. Co.*, 71 N. Y. 180, 27 Am. Rep. 28.

goods, limiting its responsibility, will not be construed as exempting it from liability for negligence, if fairly capable of other construction.⁴⁴ Where by the contract of transportation, the property is shipped "at the owner's risk," these words will not be held to exempt the carrier for loss caused by its negligence.⁴⁵ A provision in a bill of lading that the carrier shall not be liable for any loss or breakage does not exempt the carrier from the consequences of its own negligence.⁴⁶ A contract for the transportation of goods, stipulating that the carrier shall not be liable for any damage in excess of a specified amount, nor, in any event, for more than the true value of the property, does not, by the attempt to limit the carrier's liability, relieve it from liability for a loss occasioned by its negligence.⁴⁷ And a contract exempting the carrier from liability for injuries caused by the negligence of the carrier's servants in the execution of the contract will not excuse a deliberate, intentional act constituting a breach of the contract.⁴⁸

§ 18. Rule in Illinois and Wisconsin.

In Illinois and Wisconsin the rule seems to be that carriers may by special contract exempt themselves from liability when the loss or injury results from their negligence or the negligence of

44. *Rathbone v. New York Cent., etc., R. Co.*, 140 N. Y. 48, 61 Am. & Eng. R. Cas. 150; *Kenney v. New York Cent., etc., R. Co.*, 125 N. Y. 422; *Fowler v. Liverpool, etc., Steam Co.*, 87 N. Y. 190, 9 Am. & Eng. R. Cas. 235; *Canfield v. Baltimore, etc., R. Co.*, 93 N. Y. 532, 45 Am. Rep. 268, 16 Am. & Eng. R. Cas. 152; *Blair v. Erie R. Co.*, 66 N. Y. 313, 23 Am. Rep. 55; and cases cited in preceding notes to this section. See also, *Fasy v. International Nav. Co.*, 177 N. Y. 591, 70 N. E. 1098, affg. 77 App. Div. (N. Y.) 469, 79 N. Y. Supp. 1103.

45. *Canfield v. Baltimore, etc., R.*

Co., supra; *Wells v. Steam Nav. Co.*, 8 N. Y. 380; *Mynard v. Syracuse, etc., R. Co., supra*; *Nicholas v. New York Cent. R. Co., supra*; *Moore v. Evans, supra*; *Alexander v. Greene*, 7 Hill (N. Y.), 546; *French v. Buffalo, etc., R. Co.*, 4 Keyes (N. Y.), 113; *McCaffrey v. Twenty-third St. R. Co.*, 47 Hun (N. Y.), 404.

46. *Hutkoff v. Pennsylvania R. Co.*, 29 Misc. Rep. (N. Y.) 770, 61 N. Y. Supp. 254.

47. *Marquis v. Wood*, 29 Misc. Rep. (N. Y.) 590, 61 N. Y. Supp. 251.

48. *Keeney v. Grand Trunk R. Co.*, 47 N. Y. 525, 1 Am. Ry. Rep. 466.

their servants, except when such negligence is gross.⁴⁹ Railroad companies have a right to restrict their liability as common carriers by such contracts as may be agreed on specially, they still remaining liable for gross negligence or willful misfeasance, against which morals and public policy forbid that they be permitted to stipulate.⁵⁰ In accepting live stock for transportation, the carrier undertakes to use ordinary care for its safety commensurate with its nature and condition, and all contracts in which the carrier undertakes to limit its liability to less than the use of ordinary care for the safety of such stock may be rejected.⁵¹

§ 19. The English and Canadian rule.

The English courts at an early period adopted the rule that carriers might limit their liability either by contract or by general public notice for losses caused by their own negligence,⁵² except

49. Ill.—Chicago, etc., R. Co. v. Davis, 159 Ill. 53; Wabash R. Co. v. Brown, 51 Ill. App. 656, 152 Ill. 484; Wabash, etc., R. Co. v. Peyton, 106 Ill. 534, 46 Am. Rep. 705, 18 Am. & Eng. R. Cas. 1; Merchants' Despatch Transp. Co. v. Thielbar, 86 Ill. 71; Erie, etc., Transp. Co. v. Dater, 91 Ill. 195, 33 Am. Rep. 51, 8 Cent. L. J. 293; Erie R. Co. v. Wilcox, 84 Ill. 239, 25 Am. Rep. 451, 16 Am. Ry. Rep. 457; Chicago, etc., R. Co. v. Montfort, 60 Ill. 175; Illinois Cent. R. Co. v. Smyser, 38 Ill. 354, 87 Am. Dec. 301; Adams Express Co. v. Stettaners, 61 Ill. 184, 14 Am. Rep. 57; Merchants' Despatch, etc., Co. v. Moore, 88 Ill. 136, 30 Am. Rep. 541; Chicago, etc., R. Co. v. Chapman, 30 Ill. App. 504, 133 Ill. 96, 23 Am. St. Rep. 587, 42 Am. & Eng. R. Cas. 392; Illinois Cent. R. Co. v. Jonte, 13 Ill. App. 424; Chicago, etc., R. Co. v. Harmon, 17 Ill. App. 640; Chicago, etc., R. Co. v. Hawk, 42 Ill. App. 322.

Wis.—Abrams v. Milwaukee, etc., R. Co., 87 Wis. 485, 41 Am. St. Rep. 55; Lawson v. Chicago, etc., R. Co., 64 Wis. 455, 54 Am. Rep. 634; Black v. Goodrich Transp. Co., 55 Wis. 319, 42 Am. Rep. 713; Cream City R. Co. v. Chicago, etc., R. Co., 63 Wis. 93, 53 Am. Rep. 267.

50. Baltimore, etc., R. Co. v. Ross, 105 Ill. App. 54.

51. United States Express Co. v. Burke, 94 Ill. App. 29.

52. Gibbons v. Paynton, 4 Burr. 2298; **Downs v. Fromont,** 4 Campb. 40; **Maving v. Todd,** 4 Campb. 225, 1 Stark. 72, 2 E. C. L. 37; **Alfred v. Horne,** 3 Stark. 136, 14 E. C. L. 168; **Peek v. North Staffordshire R. Co.,** 9 Jur. N. S. 914, 10 H. L. Cas. 473, 32 L. J. Q. B. 241; **Covington v. Willan,** Gow. 115, 5 E. C. L. 481; **Garnett v. Willan,** 5 B. & Ald. 53, 7 E. C. L. 19; **Bignold v. Waterhouse,** 1 M. & S. 255; **Mayhew v. Eames,** 3 B. & C. 601, 10 E. C. L. 195; **Leeson v. Holt,**

where the negligence was gross.⁵³ By the English Carrier's Act of 1830 it was provided in substance that no common carrier by land for hire should be liable for a loss or injury to any article of property specified in the statute, if the value should exceed ten pounds, not occasioned by the felonious acts of his servants or his own personal negligence unless, at the time of shipment, its nature and value should be stated and an increased charge paid for its transportation; that no public notice should have the effect of limiting the carrier's liability as to any article other than those specified in the act; and that the act should not be so construed as in any wise to affect any special contract with the carrier. Under this act the courts still maintained the rule that carriers might, by special contract, stipulate against liability for any loss resulting from their own negligence, except where there was wilful negligence or misfeasance.⁵⁴ The Carrier's Act was modified in

1 Stark. 186, 2 E. C. L. 77; Butt v. Great Western R. Co., 11 C. B. 140, 73 E. C. L. 140. See Fish v. Chapman, 2 Ga. 349, 46 Am. Dec. 393.

53. Wright v. Snell, 5 B. & Ald. 350, 7 E. C. L. 127; Sleat v. Fagg, 5 B. & Ald. 342, 7 E. C. L. 123; Newborn v. Just, 2 C. & P. 76, 12 E. C. L. 34; Beck v. Evans, 16 East 244, 3 Campb. 267; Birkett v. Willan, 2 B. & Ald. 356; Smith v. Horne, 2 Moore 18, 8 Taunt. 144, 4 E. C. L. 50; Beal v. South Devon R. Co., 3 H. & C. 337, 12 W. R. 1115; Beckford v. Crutwell, 5 C. & P. 242, 24 E. C. L. 300, 1 M. & Rob. 187; Bodenham v. Bennett, 4 Price 31; Langley v. Brown, 1 M. & P. 583, 17 E. C. L. 193. See also, Hollister v. Nowlen, 19 Wend. (N. Y.) 234; Cole v. Goodwin, 19 Wend. (N. Y.) 251; New York Cent. R. Co. v. Lockwood, 17 Wall. 357; Sager v. Portsmouth, etc., R. Co., 31 Me. 228.

54. Webb v. Great Western R. Co., 26 W. R. 111; Hughes v. Great West-

ern R. Co., 14 C. B. 637, 78 E. C. L. 637; Slim v. Great Northern R. Co., 14 C. B. 647, 78 E. C. L. 647; York, etc., R. Co. v. Crisp, 14 C. B. 527, 78 E. C. L. 527; Morville v. Great Northern R. Co., 16 Jur. 528, 7 Railw. Cas. 830, 21 L. J. Q. B. 319; Carr v. Lancashire, etc., R. Co., 7 Exch. 707, 7 Railw. Cas. 426, 17 Jur. 397; Wilton v. Atlantic, etc., Nav. Co., 10 C. B. N. S. 453, 100 E. C. L. 453, 8 Jur. N. S. 232, 9 W. R. 748; Dodson v. Grand Trunk R. Co., 7 Canada L. J. N. S. 263; The Duero, 22 L. T. N. S. 37; Stewart v. London, etc., R. Co., 3 H. & C. 135, 10 Jur. N. S. 805, 12 W. R. 689; Hoare v. Great Western R. Co., 37 L. T. N. S. 186, 25 W. R. 63; Chippendale v. Lancashire, etc., R. Co., 15 Jur. 1106, 7 Railw. Cas. 824; Great Western R. Co. v. Glenister, 22 W. R. 72, 29 L. T. N. S. 422; Ronan v. Midland R. Co., L. R. 14 Ir. 157; Lewis v. Great Western R. Co., 3 Q. B. Div. 195, 47 L. J. Q. B. Div. 131,

1854 by the Railway and Canal Traffic Act, which applied to railways and canal traffic only, and provided in substance that such carriers could not limit their liability for negligence except by a contract signed by the shipper or his agent and adjudged by the court before whom any question relating to it should be tried to be just and reasonable.⁵⁵ Under these acts, upon which the adjudications of English courts are based, the rule has become well established that contracts limiting the liability of carriers are just and reasonable and will be sustained by the courts when it has been shown that a fair and genuine alternative has been offered the shipper of having his goods carried free from restrictive conditions at a higher rate, which is not prohibitive or excessive, or at a lower rate under which the carrier is released from all responsibility except gross negligence, fraud or wilful wrong on the part of the carrier or its servants, and that a sufficient consideration has been given by the carrier for the reduced liability assumed under the contract.⁵⁶ The rule in Canada is practically the same.⁵⁷

37 L. T. N. S. 774, 26 W. R. 255, 15 Am. Ry. Rep. 601.

55. *Robinson v. London, etc., R. Co.*, 19 C. B. N. S. 51, 115 E. C. L. 51, 11 Jur. N. S. 390, 13 W. R. 660.

56. *Gallagher v. Great Western R. Co.*, 8 Ir. R. C. L. 326; *Taubman v. Pacific Steam Nav. Co.*, 26 L. T. 704; *Peek v. North Staffordshire R. Co.*, 10 H. L. Cas. 473, 9 Jur. N. S. 914, 11 W. R. 1023; *Garton v. Bristol, etc., R. Co.*, 1 B. & S. 112, 101 E. C. L. 112, 7 Jur. N. S. 1234; *Lloyd v. Waterford, etc., R. Co.*, 15 Ir. C. L. R. 37; *Steele v. State Line Steamship Co.*, L. R. 3 App. 72; *Hill v. Scott*, 2 Q. B. 371; *Norman v. Binnington*, 25 Q. B. Div. 475; *Foreman v. Great Western R. Co.*, 38 L. T. N. S. 851; *Great Western R. Co. v. McCarthy*, L. R. 12 App. 218, 29 Am. &

Eng. R. Cas. 87; *Great Western R. Co. v. Glenister*, 29 L. T. N. S. 422, 22 W. R. 72; *Manchester, etc., R. Co. v. Brown*, L. R. 8 H. L. 703, 16 Am. & Eng. R. Cas. 174; *Beal v. South Devon R. Co.*, 3 H. & C. 337, 12 W. R. 1115, 11 L. T. N. S. 184; *Aldridge v. Great Western R. Co.*, 15 C. B. N. S. 582, 109 E. C. L. 582; *MacAndrew v. Electric Tel. Co.*, 17 C. B. 3, 84 E. C. L. 3, 1 Jur. N. S. 1073; *McManus v. Lancashire, etc., R. Co.*, 4 H. & N. 327, 5 Jur. N. S. 651; *Ashenden v. London, etc., R. Co.*, 28 W. R. 511; *Baxendale v. Great Eastern R. Co.*, 10 B. & S. 212; *Lord v. Midland R. Co.*, L. R. 2 C. P. 339, 15 W. R. 405, 36 L. J. C. P. 170; *Ronan v. Midland R. Co.*, L. R. 14 Ir. 157; *Moore v. Midland R. Co.*, 8 Ir. R. C. L. 232, 9 Ir. R. C. L. 20; *Harris v. Midland R.*

As it has been expressed by the courts, there are no fixed or established rules by which the courts can be governed in concluding whether or not particular conditions in contracts of this character are just and reasonable or not, but each case must be determined upon its own circumstances.⁵⁸

§ 20. Reasons upon which the different rules are based.

The New York doctrine is founded upon the principle that it is a matter of personal right that an individual should be permitted to make his own agreement as to the terms upon which he shall have his goods transported, and that it is not a matter of public concern that he should be deprived of this right on the theory that it is necessary for his protection or benefit, except in so far as it is necessary to protect him from fraud or imposition.⁵⁹ The

Co., 25 W. R. 63; *Haynes v. Great Western R. Co.*, 41 L. T. N. S. 436; *Doolan v. Midland R. Co.*, L. R. 2 App. 792, 37 L. T. N. S. 317; *Robinson v. London, etc., R. Co.*, 19 C. B. N. S. 51, 115 E. C. L. 51, 11 Jur. N. S. 790; *Pardington v. South Wales R. Co.*, 1 H. & N. 392, 26 L. J. C. P. 105; *Harrison v. London, etc., R. Co.*, 2 B. & S. 122, 110 E. C. L. 122, 31 L. J. Q. B. 113; *White v. Great Western R. Co.*, 2 C. B. N. S. 7, 89 E. C. L. 7, 26 L. J. C. P. 158; *D'Arc v. London, etc., R. Co.*, L. R. 9 C. P. 325, 22 W. R. 919.

57. *Farr v. Great Western R. Co.*, 35 U. C. Q. B. 534; *Hamilton v. Grand Trunk R. Co.*, 23 U. C. Q. B. 600; *Hood v. Grand Trunk R. Co.*, 20 U. C. C. P. 361; *Henry v. Canadian Pac. R. Co.*, 1 Manitoba 210; *Grand Trunk R. Co. v. Vogel*, 11 Can. Sup. Ct. 612, 27 Am. & Eng. R. Cas. 18; *Spettigue v. Great Western R. Co.*, 15 U. C. C. P. 315; *Scarlett v. Great Western R. Co.*, 41 U. C. C. P. 211;

Scott v. Great Western R. Co., 23 U. C. C. P. 182.

A condition in a shipping bill that the company is not to be liable for damage occasioned by fire not resulting from its negligence, need not be just and reasonable in order to be valid. *McMorrin v. Canadian Pac. R. Co.* (Can.), 1 Ont. Law Rep. 561.

58. *Simons v. Great Western R. Co.*, 18 C. B. 805, 86 E. C. L. 805, 26 L. J. C. P. 25; *Lewis v. Great Western R. Co.*, 47 L. J. Q. B. Div. 131, 3 Q. B. Div. 195; *Gregory v. West Midland R. Co.*, 33 L. J. Exch. 155, 2 H. & C. 944; *Rooth v. North Eastern R. Co.*, 36 L. J. Exch. 83, L. R. 2 Exch. 173, 15 L. T. N. S. 624.

59. In *Dorr v. New Jersey Steam Nav. Co.*, 11 N. Y. 485, 62 Am. Dec. 125, the court said: "To say the parties have not a right to make their own contract, and to limit the precise extent of their own respective risks and liabilities, in a matter in no way affecting the public morals or

supposing doctrine supported by the great weight of authority is based mainly upon the fact that the parties to such contracts stand upon an unequal footing, carriers generally being corporations of a *quasi* public nature, and that public policy and the common good demand that the privilege of the right of private contract should not be conferred upon such corporations to the extent of enabling them thus to secure exemption from their just obligations as public servants, by securing absolute immunity from the results of their own negligence.⁶⁰

conflicting with the public interests, would, in my judgment, be an unwarrantable restriction upon trade and commerce, and a most palpable invasion of personal right."

In *Parsons v. Monteath*, 13 Barb. (N. Y.) 353, Welles, J., says: "If I have goods to transport, and the common carrier tells me he will carry them for a particular price without incurring the risk of loss or damage by inevitable accident, but that if he takes such risks he must add a percentage to the price of transportation, I really cannot see what the public have to do with our negotiations, nor why we should not be permitted to make a valid contract, with such conditions and stipulations as we choose."

In *Smith v. New York Cent. R. Co.*, 24 N. Y. 222, Allen, J., says: "No principle is better settled than that a party to whom any benefit is secured by contract, by statute, or even by the Constitution, may waive such benefit, and the public are not interested in protecting him or benefiting him against his wishes. . . . The public have no interest in the question which of the two, A. or B., shall take the risk of the seaworthiness of

a ship, or the fitness of a railway carriage, or the care and faithfulness of a third person employed in the performance of a duty in which either or both have an interest, although by certain general rules the law has declared that, in the absence of any contract, the risk shall be upon A. and not upon B. But if B. elects to relieve A., and to assume his risks and liabilities, the public are not at all concerned, and have no occasion to forbid such contracts."

60. In *New York Cent. R. Co. v. Lockwood*, 17 Wall. (U. S.) 357, the court, by Mr. Justice Bradley, says: "The carrier and his customer do not stand on a footing of equality. The latter is only one individual of a million. He cannot afford to higgler or stand out and seek redress in the courts. His business will not admit such a course. He prefers, rather, to accept any bill of lading, or sign any paper the carrier presents; often, indeed, without knowing what the one or the other contains. In most cases he has no alternative but to do this, or abandon his business. . . . If the customer had any real freedom of choice; if he had a reasonable and practicable alternative, and if the em-

§ 21. Liabilities subject to limitation.

As has already been stated, in New York and a few other jurisdictions, the carrier may release itself by contract from its common law liability, except in case of fraud or culpable negligence amounting to fraud.⁶¹ Elsewhere the rule is well established, as we have seen, that, except as to losses resulting from its own negligence or wilful misconduct, or that of its servants, the carrier may by express contract stipulate against liability for any loss occur-

ployment of the carrier were not a public one, charging him with the duty of accommodating the public in the line of his employment—then, if the customer chose to assume the risk of negligence, it could with more reason be said to be his private affair, and no concern of the public. But the condition of things is entirely different, and especially so under the modified arrangements which the carrying trade has assumed. The business is mostly concentrated in a few powerful corporations, whose position in the body politic enables them to control it. They do, in fact, control it, and impose such conditions upon travel and transportation as they see fit, which the public is compelled to accept. These circumstances furnish an additional argument, if any were needed, to show that the conditions imposed by common carriers ought not to be adverse, to say the least, to the dictates of public policy and morality. The status and relative position of the parties render any such conditions void. Contracts of common carriers, like those of persons occupying a fiduciary character giving them a position in which they can take undue advantage of the persons with whom they contract, must rest

upon their fairness and reasonableness."

In *Little Rock, etc., R. Co. v. Cravens*, 57 Ark. 112, 55 Am. & Eng. R. Cas. 650, the court says: "The individual feels that transportation is necessary to his success and that unless he gets it promptly he will suffer inconvenience and perhaps loss. He regards the probability of loss in transit as remote, and knows that if there is no loss, the contract is immaterial. Under such circumstances, he will assume the risk of contingent future loss rather than sustain a loss that is certain and present, as men usually are prone to sacrifice contingent future interest to satisfy present wants. So we think it should be held, as a matter of law, that the parties stand upon a footing of inequality, and that individuals desiring to make shipments are under a necessity sufficient, in the ordinary affairs of life, to amount to compulsion, where it is pressed."

61. *Bissell v. New York Cent. R. Co.*, 25 N. Y. 442; *Wells v. New York Cent. R. Co.*, 24 N. Y. 181; *Perkins v. New York Cent. R. Co.*, 24 N. Y. 196. See also, §§ 17 and 18, *ante*, and cases there cited.

ring from any cause whatever.⁶² It may stipulate that it shall not be liable for losses occasioned by fire and a shipper is bound by such a provision in a bill of lading, where he was chargeable with knowledge that the bill contained such a clause and made no objection thereto, and it is not shown that the loss resulted from the carrier's negligence.⁶³ It may stipulate against losses occasioned by strikes of its employes.⁶⁴ It may, by special contract, limit its liability for loss of or injury to goods of a specified class, unless the shipper has complied with certain conditions.⁶⁵ A provision in a bill of lading limiting the carrier's liability to damages resulting only from negligence of itself or its agent is reasonable and binding.⁶⁶ An agreement that a carrier shall not be responsible for loss or damage from one of certain specified causes, other than its own negligence is valid.⁶⁷ The carrier may stipulate that it will not be liable for loss or injury of goods after they have passed from its hands into those of a connecting line.⁶⁸ It may stipulate that it will not be liable for the loss of goods unless at the time they are received for shipment a memorandum in writing stating

62. See § 1, *ante*, and cases there cited.

63. *Cau v. Texas, etc., R. Co.*, 113 Fed. 91; *Charnock v. Texas, etc., R. Co.*, 113 Fed. 92; *Steinweg v. Erie R. Co.*, 43 N. Y. 123, 3 Am. Rep. 673; *Bostwick v. Baltimore, etc., R. Co.*, 45 N. Y. 712; *Lamb v. Camden, etc., R. Co.*, 46 N. Y. 271, 7 Am. Rep. 327; *Stedman v. Western Transp. Co.*, 48 Barb. (N. Y.) 97; *Davis v. Central Vermont R. Co.*, 66 Vt. 290, 44 Am. St. Rep. 852; *New Orleans Mut. Ins. Co. v. New Orleans, etc., R. Co.*, 20 La. Ann. 302; *St. Louis, etc., R. Co. v. Bone*, 52 Ark. 26; *Seller v. Steamship Pacific*, 1 Or. 409; *Levy v. Pontchartrain R. Co.*, 23 La. Ann. 477; *New Jersey Steam Nav. Co. v. Merchants' Bank*, 6 How. (U. S.) 344;

McMorrin v. Canadian Pac. R. Co. (Can.), 1 Ont. Law Rep. 561.

64. *Gulf, etc., R. Co. v. Gatewood*, 79 Tex. 89; *International, etc., R. Co. v. Server*, 3 Tex. App. Civ. Cas. § 441. See *Liability for delay*, § 1, chap. 8.

65. *Georgia, etc., R. Co. v. Reid*, 91 Ga. 377; *Illinois Cent. R. Co. v. Scruggs*, 69 Miss. 418; *Atchison, etc., R. Co. v. Bryan* (Tex. Civ. App.), 28 S. W. 98; *Virginia, etc., R. Co. v. Sayers*, 26 Gratt. (Va.) 328.

66. *Louisville, etc., R. Co. v. Landers* (Ala.), 33 So. 482.

67. *Morse v. Canadian Pac. R. Co.*, 97 Me. 77, 53 Atl. 874.

68. See *Connecting Carriers*, chap. 20

the character and value of the articles is delivered by the shipper and an extra compensation paid; but such a provision will not relieve the carrier from liability for negligence, if it is informed before shipment of the special and unusual value of the goods shipped.⁶⁹ Carriers have the right to contract against their assumption of liability that accrues to them merely as bailees, and in common with other bailees, and not as carriers.⁷⁰ Where no duty rests upon the carrier under the common law or by reason of a statute to receive and transport the goods, it may limit its liability to any extent except for wilful injury, negligence or misfeasance, as, for example, for losses occasioned in the transportation of dangerous explosives,⁷¹ or for losses not occurring on its own line or originating there,⁷² or for losses in the transportation of a circus train loaded with wild animals.⁷³ A carrier and a shipper have a right to stipulate in advance the value of goods shipped, and to limit the carrier's liability in case of their loss or damage from any cause except collision or from cars being thrown from the

69. *Rathbone v. New York Cent., etc.*, R. Co., 140 N. Y. 48.

70. *Chicago, etc., R. Co. v. Schuldt* (Neb.), 92 N. W. 162.

71. *California Powder Works v. Atlantic, etc., R. Co.*, 113 Cal. 329.

72. See *Connecting Carriers*, chap. 20

73. Where a railroad company agreed to haul certain cars of the proprietor of a circus according to a special schedule, and for a price less than the regular rates for such services, the carrier's servants having no right to direct the loading or unloading, which was in the exclusive charge of the employes of the circus company, an express contract between the parties, exempting the carrier from liability for the negligence of its employes, and releasing the carrier from

liability for loss and damage to any of the circus company's property, menagerie, cars, or equipment while in transit, and to indemnify the carrier against damage or injury to any of the circus company's officers, agents, performers, or employes, was not invalid, as contrary to public policy. *Wilson v. Atlantic, etc., R. Co.*, 129 Fed. 774. Citing *New York Cent. R. Co. v. Lockwood*, 17 Wall. 357, 21 L. Ed. 627; *Chicago, etc., R. Co. v. Wallace*, 66 Fed. 506, 14 C. C. A. 257, 30 L. R. A. 161; *Coup v. Wabash, etc., R. Co.*, 56 Mich. 111, 22 N. W. 215; 56 Am. Rep. 374; *Robertson v. Old Colony R. Co.*, 156 Mass. 525, 31 N. E. 650, 32 Am. St. Rep. 482. Following *Railway Co. v. Wright*, 176 U. S. 498, 20 S. Ct. 385, 44 L. Ed. 560.

track.⁷⁴ Though a common carrier can make a valid agreement fixing the value of shipments in case of loss by its negligence, such agreement must be reasonable, and it cannot stipulate that it shall be liable for an amount less than the value of property lost by its negligence, thereby exempting itself *pro tanto* from liability, the measure of damages being the amount of the loss.⁷⁵ In all such cases, the burden of proof is upon the shipper and the carrier will not be liable for any loss or injury to goods shipped within the terms of the exemption in the contract, except upon proof that the loss or injury was the result of the carrier's negligence.⁷⁶

§ 22. Mode or form of limitation.—Bill of lading or shipping receipt.

The acceptance of a receipt limiting the liability of a carrier for goods received by it for carriage makes a contract binding on both parties.⁷⁷ But, an express company acting as a collector cannot limit its liability as such for accepting a draft instead of money to that of a forwarder, nor to a definite sum, by stipulations in its receipt given for the claim to be collected.⁷⁸ Where a package is delivered to a carrier, to be delivered in another State, the company's receipt, stating that it shall not be liable to the holder beyond a certain sum, at which the article forwarded is valued, which is not signed by the shipper, and no statement is made by him as to its value, is not a valid stipulation against the negligent loss of such package.⁷⁹ But where a shipping receipt, entered into in consideration of a reduced rate of shipment, stipulates that no carrier shall be liable for damages by water not due to its own negligence or that of its servants, an objection in an

74. *Hill v. Northern Pac. R. Co.*, 33 Wash. 697, 74 Pac. 1054.

75. *Gardiner v. Southern R. Co.*, 127 N. C. 293, 37 S. E. 328.

76. See Burden of Proof where special contract is set up, § 5, chap. 14.

77. *Adams Express Co. v. Carna-*

han, 29 Ind. App. 606, 63 N. E. 245, 94 Am. St. Rep. 279, rehearing denied 29 Ind. App. 606, 64 N. E. 647, 94 Am. St. Rep. 279.

78. *Gowling v. American Express Co.*, 102 Mo. App. 366, 76 S. W. 712.

79. *Jacobson v. Adams Express Co.*, 1 O. C. D. 212, 1 Ohio Cir. Ct. 381.

action against one of the carriers for damages to the freight by water that the instrument is a mere receipt, and not a binding contract, is untenable.⁸⁰ An initial carrier, issuing a bill of lading stipulating for the carriage of goods to their destination if on its road, otherwise to deliver the same to another carrier on the route to said destination, and providing that no carrier shall be liable for loss not occurring on its own road, nor after the property is ready for delivery to the next carrier or consignee, is not liable for the failure of the connecting carrier to deliver the goods.⁸¹ Exemptions from liability will not be presumed, but must be found clearly expressed in the contract, and, if there be any ambiguity, it will be resolved against the carrier;⁸² and the burden of proving such exemption is upon the carrier.⁸³ If, by its terms, the contract of carriage covers all the lines between the point of shipment and the destination of the goods, then the initial carrier becomes liable for the faithful performance of duty by all the carriers, and each is entitled to such exemption as is contained in the contract of carriage.⁸⁴ But where the first carrier only contracts to carry to and deliver to another carrier, such connecting carrier is not entitled to any exemptions by virtue of that contract of carriage; and the fact that it was known at the time of shipment that the goods would go over different lines does not change the liability of the carrier, unless it stipulate therefor.⁸⁵ Under a statute, providing that, when any property is delivered to a common carrier to be transported, it shall not be lawful for the carrier to limit its common law liability by any stipulation expressed in the receipt given for the property, the mere delivery

80. *Mears v. New York, etc., R. Co.*, 75 Conn. 171, 52 Atl. 610, 56 L. R. A. 884, 96 Am. St. Rep. 192.

81. *American Hay Co. v. Bath, etc., R. Co.*, 85 N. Y. Supp. 341.

82. *Edsall v. Camden, etc., R. Co.*, 50 N. Y. 661.

83. *Jennings v. Grand Trunk R. Co.*, 127 N. Y. 438, 28 N. E. 394.

84. *Jennings v. Grand Trunk R. Co.*, *supra*.

85. *Aetna Insurance Co. v. Wheeler*, 49 N. Y. 616; *Robinson v. New York, etc., S. Co.*, 63 App. Div. (N. Y.) 211, 71 N. Y. Supp. 424.

of a receipt restricting the indemnity to the consignor, the carrier having full means of knowledge of the character of the consignment, and in the absence of any express agreement limiting the liability, does not restrict the right of the owner, suffering loss from the negligence of the carrier, to recover full compensation.⁸⁶

But, notwithstanding such a statute, a contract signed by the shipper, providing that, in consideration of the lower rate of freight, his recovery, in case of damage, shall be limited to a specified amount, is binding on him, he knowing of the provision, though the railroad clerk told him the clause "did not amount to anything," and was "only a matter of form," such statement not being within the line of the servant's duties, and the contract informing the shipper of the two rates, that the lower was in consideration of the limited liability, that the shipper could be bound only by written contract, and that a special contract could only be made by a general officer.⁸⁷ A shipper's acceptance of an express company's receipt limiting liability for value unless a different value is stated is sufficient to justify application of the doctrine that such company, when its rates are graduated by value, may under the Carmack Amendment, June 29, 1906, to Act February 4, 1887, § 20, limit its liability for loss to the declared value.⁸⁸ The valuation named in a shipping contract signed by the shipper is as much an agreed valuation within that amendment as if the shipper had stated the value on inquiry.⁸⁹ A consignor, who delivers goods to an express company, and who accepts a paper with knowledge that it contains a contract, impliedly agrees to the terms thereof; but a consignor, who accepts a receipt without notice or knowledge that it contains a contract on the back thereof, does not agree to its terms.⁹⁰ General words in a contract of car-

86. *Powers Mercantile Co. v. Wells, Fargo & Co.*, 93 Minn. 143, 109 N. W. 735.

87. *Jennings v. Smith*, 99 Fed. 189.

88. *Wells, Fargo & Co. v. Neiman-Marcus Co.*, 227 U. S. 469, 33 Sup. Ct. 267, 57 L. Ed. —.

89. *Missouri, etc., R. Co. v. Harri-man Bros.*, 227 U. S. 657, 33 Sup. Ct. 397, 57 L. Ed. —.

90. *Bennett v. Virginia Transfer Co.*, 140 N. Y. Supp. 1055.

Where one shipped his trunk by express and agreed to pay a specified

riage are not sufficient to release a carrier from negligence, but, if such a result is intended, it must be expressly provided for; and hence, where a bill of lading in a shipment of glass contained a condition that defendant would not be liable for damages to glass by breakage or for any cause, if it should be necessary or was usual to carry such property upon open cars, and the words "Loaded and secured by shipper, released," were written upon the face of it, the defendant's liability for negligence remained unaffected.⁹¹ An express contract, attempting to limit a carrier's liability to fifty dollars in case the value of the property is not stated in the receipt, being unenforceable, as contrary to the public policy of Georgia, it was not material that the form of receipt was filled out by the consignor for the signature of the carrier's agent.⁹² A common carrier cannot limit its liability by any notice given either by publication or by entry on receipts or by tickets sold, but may make an express contract releasing it from liability not

sum for the expressage when delivered at his residence, and there was nothing to show that he was about to become a passenger of the carrier, the shipment was one of express freight, binding him, in the absence of fraud or imposition, to the printed receipt given him limiting the carrier's liability to a specified sum. *Baum v. Long Island R. R.*, 108 N. Y. Supp. 1113, 58 Misc. Rep. 34.

An express receipt, limiting the liability of the carrier to a specified amount, constitutes the contract of the parties, and operates to limit the liability. *Clark v. Martin*, 135 N. Y. Supp. 664.

91. *Brewster v. New York Cent., etc., R. Co.*, 129 N. Y. Supp. 368, 145 App. Div. 51.

92. *Adams Express Co. v. Chamberlin-Johnson-Du Bose Co.*, 138 Ga. 455, 75 S. E. 601.

Where a jeweler in New York delivered to an express company a ring for shipment to plaintiff in Georgia, and the carrier's agent, in signing the jeweler's receipt book, stamped thereon, "Value asked and not given," without in fact asking whether the jeweler desired to value the package, plaintiff's recovery for loss of the ring through the carrier's negligence was not limited to \$50, as provided in the receipt. *Adams Express Co. v. Mellichamp*, 138 Ga. 443, 75 S. E. 596.

The mere insertion in a printed form of receipt used by an express company, of terms limiting its liability, and the delivery of the receipt to a shipper, does not constitute an express contract limiting the company's liability as carrier. *Southern Express Co. v. Hanaw*, 134 Ga. 445, 67 S. E. 944.

arising from its negligence.⁹³ While a carrier's common-law liability cannot be limited by conditions expressed in a mere notice to the shipper or to the general public, nor by the terms of a receipt for the goods, or where the conditions are printed on the back of the bill of lading or stamped across its face, yet conditions printed or written on the face and in the body of the bill will be presumed to have been assented to and to form part of a valid, enforceable contract, where the consignor receives the bill and ships the goods without complaint, if such conditions are not inimical to law.⁹⁴ Mere acceptance by a shipper, without objection, of a bill of lading tendered by the common carrier, containing a stipulation importing limitation of liability on an assumed valuation of goods, not corresponding with their real value, raises a presumption that the shipper knew of the restriction and would be bound thereby, but it is not conclusive against the shipper and such presumption may be rebutted by evidence negating knowledge and assent.⁹⁵ A carrier cannot limit its common-law liability safely to deliver consigned property at the place of destination by any limitation expressed in its receipt for the property.⁹⁶ But the statutory inhibition against limitations of liability by a carrier in a receipt does not apply to bills of lading; such limitations

93. *Central of Ga. Ry. Co. v. City Mills Co.*, 128 Ga. 841, 58 S. E. 197.

A general limitation as to the value, expressed in a bill of lading, which is clearly nothing more than an arbitrary preadjustment of the measure of damages in case of loss, will not exempt the carrier from liability for the true value of a shipment lost by its negligence. *Central of Ga. Ry. Co. v. Butler Marble & Granite Co.*, 8 Ga. App. 1, 68 S. E. 775.

A condition in a receipt or bill of lading given by a carrier to a compress company, exempting the carrier from liability for loss by fire, did not

constitute such an express contract as would relieve the carrier from liability, and was not binding on the shipper or owner. *Atlantic Compress Co. v. Central of Ga. Ry. Co.*, 135 Ga. 140, 68 S. E. 1028; *Seaboard Air Line Ry. v. Atlantic Compress Co.*, 135 Ga. 413, 69 S. E. 566.

94. *Inman & Co. v. Seaboard Air Line Ry. Co.*, 159 Fed. 960 (U. S. C. C., Ga.); *Inman & Co. v. Atlantic Coast Line R. Co.*, id.

95. *Hill v. Adams Express Co.* (Err. & App., N. J.), 81 Atl. 859, affg. judg. 80 N. J. Law, 604, 77 Atl. 1073.

96. *Pennsylvania R. Co. v. John Anda Co.*, 131 Ill. App. 426.

may properly be inserted in bills of lading.⁹⁷ If a bill of lading has printed upon the back thereof certain conditions, compliance with such conditions is not essential to the right of the shipper to enforce the common-law liability of the carrier.⁹⁸ Where an express receipt provided that the rate was based on the value of the property, which must be declared by the shipper, a provision that unless a greater value was declared the shipper agreed that the value of the property was not more than fifty dollars, and that the carrier should not be liable for a greater amount, was not objectionable as limiting the carrier's liability for negligence, but was reasonable and binding on the shipper.⁹⁹ Where, after the loss of goods while in the possession of a carrier, it executed and sent to the shipper a bill of lading limiting the carrier's liability as a matter of convenience for the purpose of identifying the property lost, the shipper's receipt of such bill did not limit the carrier's common-law liability.¹ In the absence of statutory regulation, where no receipt is given by the carrier at the time of shipment, it cannot limit its liability by afterwards delivering to the shipper a receipt containing a limited liability clause, if the shipper had no knowledge that the carrier claimed any such limitations at the time of shipment.² Where an express receipt recited that the carrier agreed to carry the articles on the following terms and conditions, to which the shipper agreed, and as evidence thereof accepted the bill of lading, such acceptance constituted the shipper's assent to a clause that the carrier should not be liable for loss or damage to the goods, unless suit was commenced within

97. *Illinois Match Co. v. Chicago*,
etc., Ry. Co., 153 Ill. App. 568.

98. *Painkinsky v. Illinois Cent. R.*
Co., 165 Ill. App. 556.

99. *De Wolff v. Adams Express Co.*,
106 Md. 472, 67 Atl. 1099.

1. *McGregor v. Oregon R. & Nav.*
Co., 50 Or. 527, 93 Pac. 465.

2. *Farnsworth v. National Express*
Co., 166 Mich. 676, 132 N. W. 441,

also holding that the Michigan statute does not change the common-law liability of carriers, and that the mere failure of a shipper to demand a receipt containing a limited liability clause did not relieve the carrier from the obligation of giving such receipt in case it desired to limit its common-law liability, etc.

a year thereafter.³ Where the published tariff provides two rates, one with the carrier's ordinary liability, and the other a lesser rate, by reason of liability being limited, and the shipper makes no selection of rate, it is proper for the carrier to elect which rate shall apply, but a bill of lading showing the limited liability must be executed and delivered at the time the carrier accepts the shipment, or promptly mailed in due course of business, before a loss occurs, and the carrier cannot wait until after the goods have been destroyed, and then choose to make a low rate, with a limited liability, apply to the shipment.⁴ Where cotton had been delivered to a railroad company and accepted for shipment, that the bills of lading, which were prepared by the shipper and presented to the company's agent for signing, but had not been signed before the cotton was destroyed by fire, exempted the company from liability for loss by fire, would not prevent a recovery of the value of the cotton, as the company's liability did not depend upon the undelivered bill of lading, but upon acceptance of the cotton for transportation.⁵

§ 23. Limitation of time in which to bring suit.

A limitation of the time of suit for loss or damage to goods transported, contained in a bill of lading, is not invalid on the mere ground that it contravenes the statute of limitations.⁶ And the fact that a statute prohibits a carrier from limiting its common-law liability by contract does not render such a stipulation invalid.⁷ Stipulations in the contracts of carriers limiting the time within which suit must be brought have been held valid by the courts when the period of time fixed is reasonable under the circumstances of the particular case.⁸ It has been held to be generally a question

3. *Ingram v. Weir*, 166 Fed. 328.

4. *Harris v. Great Northern Ry. Co.*, 48 Wash. 437, 96 Pac. 224.

5. *Texas Midland R. R. v. H. L. Edwards & Co.* (Tex. Civ. App.), 121 S. W. 570.

6. *Central Vermont R. Co. v. Soper*, 59 Fed. 879, 8 C. C. A. 341.

7. *Gulf, etc., R. Co. v. Trawick*, 68 Tex. 314, 2 Am. St. Rep. 494, 30 Am. & Eng. R. Cas. 49.

8. *Southern Express Co. v. Caper-*

for the jury.⁹ Similar clauses in policies of insurance are held valid.¹⁰ Likewise in contracts of telegraph companies and for like considerations.¹¹ The object of such a clause, like one requiring claim to be presented or notice of loss given within a specified time, is to enable the carrier to search for the missing goods or find out the true cause of the loss or injury; finding the missing goods, it may either deliver them to the consignee, or redeliver them to the shipper; failing to discover the goods, it can place the responsibility for the loss where it properly belongs and seek indemnity from the persons guilty of the wrong; finding the real facts as to the loss or injury it may be in a position to defend itself where lapse of time might have deprived it of all facilities for ascertaining the true cause of the loss or injury. The law recognizes that the purpose is reasonable and just and hence sustains the validity of such clauses when the time and conditions are reasonable under all the circumstances.¹² Under a statute in

ton, 44 Ala. 101, 4 Am. Rep. 118; St. Louis & S. F. R. Co. v. Burgin, 83 Ark. 502, 104 S. W. 161, where based on a reduced rate; Texas, etc., R. Co. v. Klepper (Tex. Civ. App.), 24 S. W. 567, a reduced rate of freight was held sufficient consideration to support a limitation to forty days; McCarty v. Gulf, etc., R. Co., 79 Tex. 33; Gulf, etc., R. Co. v. McCarty, 82 Tex. 608; Gulf, etc., R. Co. v. White (Tex. Civ. App.), 32 S. W. 323; Gulf, etc., R. Co. v. Gatewood, 79 Tex. 89; Gulf, etc., R. Co. v. Clarke, 5 Tex. Civ. App. 547. See also, *Ridlesbarger v. Hartford Ins. Co.*, 7 Wall. (U. S.) 386; *Cray v. Hartford F. Ins. Co.*, 1 Blatchf. (U. S.) 280.

9. Texas, etc., R. Co. v. Hawkins (Tex. Civ. App.), 30 S. W. 1113.

10. *Wilkinson v. First Nat. Fire Ins. Co.*, 72 N. Y. 499; *Steen v. Niagara Fire Ins. Co.*, 89 N. Y. 315.

11. *Young v. Western Union Tel. Co.*, 1 Am. Electl. Cas. 187, 34 N. Y. Super. Ct. 390, 65 N. Y. 165; *Cole v. Western Union Tel. Co.*, 1 Am. Electl. Cas. 707, 33 Minn. 227, 22 N. W. 385; *Wolf v. Western Union Tel. Co.*, 62 Pa. St. 83, 1 Am. Rep. 387; *Hill v. Western Union Tel. Co.*, 3 Am. Electl. Cas. 614, 85 Ga. 425, 21 Am. St. Rep. 166, 30 Am. & Eng. Corp. Cas. 590; *Western Union Tel. Co. v. Brown*, 84 Tex. 54.

12. *Security Trust Co. v. Wells, Fargo & Co. Express*, 178 N. Y. 620; 81 App. Div. (N. Y.) 426, 80 N. Y. Supp. 830; *North British, etc., Ins. Co. v. Central Vermont R. Co.*, 158 N. Y. 726, 53 N. E. 1128, affg. judg. 40 N. Y. Supp. 1113, 9 App. Div. 4; *Kaiser v. Hoey*, 1 N. Y. Supp. 429; *Hirschberg v. Dinsmore*, 12 Daly (N. Y.), 429; *Southern Express Co. v. Caldwell*, 21 Wall. (U. S.) 264; *Mar-*

Texas no such stipulation is valid which limits the time in which suits may be brought to less than two years and the statute does not apply to interstate commerce.¹³ Nor will the shipper be precluded from bringing suit after the expiration of the time limited, where he was induced to delay action by the fraud or misrepresentation of the carrier.¹⁴ Upon the same principle it is held in New York that a shipping receipt limiting the liability of a carrier to claims presented within a fixed time does not relieve it of liability for a wrongful delivery, though the claim was not presented as soon as the consignor discovered the fraud.¹⁵ Such a stipulation will be waived by the carrier's agreement, after examining into the alleged injury, to pay a fixed sum in satisfaction of the injury, and recovery may be had for the amount so agreed upon.¹⁶ Under Texas Rev. St. 1895, art. 3378, rendering invalid contracts shortening the period of limitations to less than two years, a stipulation in a contract of carriage that suit must be brought within two years is invalid.¹⁷ The shipper and the carrier of an interstate shipment are not forbidden to stipulate that an action for damages to shipment must be brought within ninety

rus v. New Haven Steamboat Co., 30 Misc. Rep. (N. Y.) 421, 62 N. Y. Supp. 474; St. Louis, etc., R. Co. v. Hurst, 67 Ark. 407; Norfolk, etc., R. Co. v. Reeves, 97 Va. 284; Cleveland, etc., R. Co. v. Newlin, 74 Ill. App. 638; Cox v. Vermont Cent. R. Co., 170 Mass. 129, 49 N. E. 97; Popham v. Barnard, 77 Mo. App. 619; Chicago, etc., R. Co. v. Bozarth, 91 Ill. App. 68.

13. Southern Kansas Ry. Co. of Texas v. J. W. Burgess Co. (Tex. Civ. App.), 90 S. W. 189; St. Louis, etc., R. Co. v. Williams (Tex. Civ. App.), 32 S. W. 225; Reeves v. Texas, etc., R. Co., 11 Tex. Civ. App. 514; Gulf, etc., R. Co. v. Elliott (Tex. Civ.

App.), 26 S. W. 636; Gulf, etc., R. Co. v. Stanley, 33 S. W. 110; Gulf, etc., R. Co. v. Hume, 87 Tex. 211.

14. Galveston, etc., R. Co. v. Kelley (Tex. Civ. App.), 26 S. W. 470; Galveston, etc., R. Co. v. Silegman (Tex. Civ. App.), 23 S. W. 298; Gulf, etc., R. Co. v. Trawick, *supra*.

15. Security Trust Co. v. Wells, Fargo & Co. Express, *supra*.

16. Chicago, etc., R. Co. v. Katzenbach, 118 Ind. 174, 38 Am. & Eng. R. Cas. 375; International, etc., R. Co. v. Underwood, 62 Tex. 21, 21 Am. & Eng. R. Cas. 143.

17. Texas & P. Ry. Co. v. Langbehn (Tex. Civ. App.), 158 S. W. 244.

days by the Carmack Amendment June 29, 1906, § 7, to Act Feb. 4, 1887, § 20.¹⁸ Where a shipping contract limits the time within which an action for loss of goods must be brought, such time must be reasonable, and there must be prompt action on the part of the carrier in denying its liability, so that the shipper may be duly appraised of the fact that suit will be necessary.¹⁹ Where a contract of carriage provides that suit shall be brought upon it only within six months after a cause of action shall accrue, and the giving of notice within a fixed time be a condition precedent, the six months do not begin to run until notice is given.²⁰ A provision of a bill of lading that the carrier should not be liable in any suit to recover for loss or damage to the property, unless suit was brought within one year, was reasonable.²¹

§ 24. Requirement of notice of loss or presentation of claim within fixed time.

The carrier may lawfully, by contract with the shipper made by clause or stipulation in the bill of lading or shipping receipt or otherwise, provide a reasonable time within which the shipper shall present his claim or give notice of claim for loss or damage, and the manner of giving such notice or presenting his claim, and limit its liability to cases in which the claim shall be presented or notice given in accordance with the terms of the contract.²²

18. *Missouri, etc., R. Co. v. Harri-
man Bros.*, 227 U. S. 657, 33 Sup. Ct.
397, 57 L. Ed. —.

19. *Lasky v. Southern Express Co.*,
92 Miss. 268, 45 So. 869.

Stipulations made on the back of
shipping contracts limiting the time
for bringing actions for losses can be
upheld only on the ground that they
are reasonable regulations, rather
than contracts in the true sense. *Id.*

20. *Chicago, etc., R. Co. v. James*,
81 Kan. 23, 105 Pac. 49.

21. *Ingram v. Weir*, 166 Fed. 328.

22. *N. Y.—Osterhoudt v. Southern
Pac. Co.*, 47 App. Div. (N. Y.) 146,
62 N. Y. Supp. 134; *Jennings v.
Grand Trunk R. Co.*, 127 N. Y. 438,
49 Am. & Eng. R. Cas. 98; *Kaiser v.
Hoey*, 1 N. Y. Supp. 429.

*Ark.—St. Louis, etc., R. Co. v.
Hurst*, 67 Ark. 407, 55 S. W. 215.

*Dak.—Hartwell v. Northern Pac.
Express Co.*, 5 Dak. 463, stipulation
valid when signed by shipper.

*Ill.—Chicago, etc., R. Co. v. Bo-
zarth*, 91 Ill. App. 68; *Black v. Wa-
bash, etc., R. Co.*, 111 Ill. 351, 53 Am.

Such agreements are not against the policy of the law and of the

Rep. 628, 25 Am. & Eng. R. Cas. 388; *Coles v. Louisville, etc., R. Co.*, 41 Ill. App. 607; *Chicago, etc., R. Co. v. Simms*, 18 Ill. App. 68.

Ind.—*United States Express Co. v. Harris*, 51 Ind. 129; *Adams Express Co. v. Reagan*, 29 Ind. 21, 92 Am. Dec. 332; *Baltimore, etc., R. Co. v. Ragsdale*, 14 Ind. App. 406; *Case v. Cleveland, etc., R. Co.*, 11 Ind. App. 517. Delivery of a shipment of goods at the wrong place without fault of the consignor constitutes a conversion which deprives the carrier of an exemption from liability by the consignor's failure to present a verified claim for damages within 10 days. *Cleveland, etc., R. Co. v. C. & A. Potts & Co.* (Ind. App.), 71 N. E. 685.

Kan.—*Atchison, etc., R. Co. v. Morris*, 65 Kan. 532, 70 Pac. 651; *Sprague v. Missouri Pac. R. Co.*, 34 Kan. 347, 23 Am. & Eng. R. Cas. 684; *Goggin v. Kansas Pac. R. Co.*, 12 Kan. 416.

Ky.—*Owen v. Louisville, etc., R. Co.*, 87 Ky. 626.

Minn.—*Armstrong v. Chicago, etc., R. Co.*, 53 Minn. 183.

Miss.—*Southern Express Co. v. Hunnicutt*, 54 Miss. 566, 28 Am. Rep. 385.

Mo.—*Dawson v. St. Louis, etc., R. Co.*, 76 Mo. 514; *Rice v. Kansas Pac. R. Co.*, 63 Mo. 314, 20 Am. Ry. Rep. 424; *D. Klass Commission Co. v. Wabash R. Co.*, 80 Mo. App. 164, 2 Mo. App. Rep. 545, but a clause in a contract of carriage, requiring the shipper to give five days' notice of his claim for loss and damage, does not

apply to loss occurring through the carriers' failure to deliver the goods in a reasonable time, but to injury during shipment.

Where a contract of shipment provided that all claims for damages by the consignee must be reported in writing to the delivering line within 36 hours after he has been notified of the arrival of the freight, failure to give the notice will not defeat his right to recover for goods lost in transit, since notice of their arrival could not have been given, and written notice will be waived; the carrier having acted on the verbal notice of the consignee that the goods were lost, and delegated a claim agent to search for them. *Ward v. Missouri Pac. R. Co.*, 158 Mo. 226, 58 S. W. 28.

N. C.—*Wood v. Southern R. Co.*, 118 N. C. 1056; *Capehart v. Seaboard, etc., R. Co.*, 77 N. C. 355. A clause in a bill of lading releasing the carrier from liability for loss or damage of the goods if notice is not presented in writing within 30 days after the delivery thereof, or after due time for such delivery, is unreasonable and void. *Gwyn Harper Mfg. Co. v. Carolina Cent. R. Co.*, 128 N. C. 280, 38 S. E. 894.

Pa.—*Pavitt v. Lehigh Valley R. Co.*, 153 Pa. St. 302; *Weir v. Adams Express Co.*, 5 Phila. (Pa.) 355.

Tenn.—*Southern Express Co. v. Glenn* 16 Lea (Tenn.), 472.

Tex.—*Gulf, etc., R. Co. v. Trawick*, 68 Tex. 314, 2 Am. St. Rep. 494, 30 Am. & Eng. R. Cas. 49.

U. S.—*Southern Express Co. v. Caldwell*, 21 Wall. (U. S.) 264.

right to make conditions of this character there is now no question. They do not relieve carriers from any part of their obligation as common carriers. As such they are bound to the same diligence, fidelity and care as they would be required to exercise if no such stipulation had been made. All that the stipulation requires is that the shipper shall make his claim in season to enable the carrier to ascertain the facts, and it specifies what that time shall be. The only question that can arise is as to whether the condition is a reasonable one with reference to the circumstances of any particular case. Such contracts when the time and conditions are not unreasonable are universally upheld by the courts, and the right to recover on a claim for loss or damage will be barred, if the conditions of the contract are not complied with.²³ That a shipping contract required a presentation of claims within an unreasonably short time, however, does not relieve the shipper from

Eng.—Lewis v. Great Western R. Co., 5 H. & N. 867, 29 L. J. Exch. 425; Simons v. Great Western R. Co., 18 Q. B. 805, 86 E. C. L. 805; Moore v. Great Northern R. Co., L. R. 8 Ir. 95; Nicholson v. Willan, 5 East 507.

Can.—Grand Trunk R. Co. v. McMillan, 16 Can. Sup. Ct. 543, 42 Am. & Eng. R. Cas. 468; Kyle v. Buffalo, etc., R. Co., 16 U. C. C. P. 76.

Contra.—Southern Express Co. v. Tuleo Bank, 108 Ala. 517.

Connecting lines.—Where the contract requires notice to the carrier at the destination of the goods, and the goods are sent over several lines, the shipper or consignee is not bound to give notice to the initial carrier at the point where the goods left its line. Atchison, etc., R. Co. v. Grant, 6 Tex. Civ. App. 674; Wichita, etc., R. Co. v. Koch, 47 Kan. 753, 55 Am. & Eng. R. Cas. 452.

23. Osterhoudt v. Southern Pac. Co., *supra*; Jennings v. Grand Trunk

R. Co., *supra*; Browning v. Long Island R. Co., 2 Daly (N. Y.), 117; Central Vermont R. Co. v. Soper, 59 Fed. 879, 61 Am. & Eng. R. Cas. 151; Adams Express Co. v. Reagan, *supra*; Goggin v. Kansas Pac. R. Co., *supra*; Pacific Express Co. v. Darnell (Tex.), 6 S. W. 765; Harned v. Missouri Pac. R. Co., 51 Mo. App. 482; Sanford v. Housatonic R. Co., 11 Cush. (Mass.) 155; St. Louis, etc., R. Co. v. Hurst, *supra*.

That the question of reasonableness of the time limit is for the jury has been held in several Texas cases: Texas, etc., R. Co. v. Adams, 78 Tex. 372, 22 Am. St. Rep. 56; Texas, etc., R. Co. v. Barber (Tex. Civ. App.), 30 S. W. 500; Gulf, etc., R. Co. v. Wright, 1 Tex. Civ. App. 402. Also whether the contract is one for an interstate or domestic shipment, International, etc., R. Co. v. Garrett, 5 Tex. Civ. App. 540.

presenting his claims within a reasonable time.²⁴ Such stipulations may be waived by the carrier.²⁵ And where the shipper has been prevented from or delayed in filing a claim for the goods within the time prescribed, by the carrier's falsely informing him that the goods were still in its possession and would be returned, or by the carrier's promising to find the goods, or by similar representations, the carrier is estopped from pleading the condition in the bill of lading or shipping receipt as a defense to the action.²⁶ Such a condition of a contract of shipment applies to the carrier's conduct as a warehouseman since such relation is properly incident to that of carrier.²⁷ Most of the authorities sustain such stipulations even where the loss is one caused by the defendant company's negligence.²⁸ In Texas such a stipulation is held to be a limitation of the common law liability of the carrier and of no effect where the loss is one resulting from the carrier's negligence.²⁹ In New York such a stipulation is held

24. *Osterhoudt v. Southern Pac. R. Co.*, *supra*; *Matthews v. American Cent. Ins. Co.*, 154 N. Y. 449, 48 N. E. 751, 39 L. R. A. 433.

25. *Pavitt v. Lehigh Valley R. Co.*, 153 Pa. St. 302; *Wood v. Southern R. Co.*, 118 N. C. 1056; *Wabash, etc., R. Co. v. Brown*, 152 Ill. 484; *International, etc., R. Co. v. Underwood*, 62 Tex. 21, 21 Am. & Eng. R. Cas. 143; *Hess v. Missouri Pac. R. Co.*, 40 Mo. App. 202; *Central R. Co. v. Pickett*, 87 Ga. 734, 55 Am. & Eng. R. Cas. 337; *Hudson v. Northern Pac. R. Co.*, 92 Iowa, 231; *Bennett v. Northern Pac. Express Co.*, 12 Or. 49; *Rice v. Kansas Pac. R. Co.*, 63 Mo. 314, 20 Am. Ry. Rep. 424; *Merrill v. American Express Co.*, 62 N. H. 514.

26. *Marrus v. New Haven Steamboat Co.*, 30 Misc. Rep. (N. Y.) 421, 62 N. Y. Supp. 474; *Security Trust Co. v. Wells, Fargo & Co. Express*,

supra; *Memphis, etc., R. Co. v. Holloway*, 9 Baxt. (Tenn.) 188. Or where the plaintiff is induced to postpone action by pretended offers of compromise, *Gulf, etc., R. Co. v. Gatewood*, 79 Tex. 89. A person who, on delivery of goods to a carrier, accepts a paper that "amounts simply to a voucher," which he may use to identify his goods, he having no notice that it contains limitations of the carrier's liability or other special contract, is not bound by such limitations. *Strong v. Long Island R. Co.*, 91 App. Div. (N. Y.) 442, 86 N. Y. Supp. 911.

27. *Armstrong v. Chicago, etc., R. Co.*, 53 Minn. 183, 54 N. W. 1059.

28. See cases already cited under this section.

29. *Missouri Pac. R. Co. v. Harris*, 67 Tex. 166, 28 Am. & Eng. R. Cas. 108.

not to be in the nature of a condition precedent to the plaintiff's right to recover but rather of the nature of a statute of limitations, which should be set up in the defendant's answer.³⁰ The time specified in such a stipulation begins to run and is to be reckoned, not from the day when the loss occurs, or when it has been reported that the goods are lost and the carrier is endeavoring to trace them, but from the day when their actual loss is ascertained and the effort to trace them has been abandoned.³¹

§ 25. To what damages stipulation does not apply.

A stipulation or clause in a contract of shipment providing that, should loss or damages of any kind occur to the property while in the possession of the carrier, the shipper shall within a specified number of days give notice in writing or present his claim to the carrier as a condition of the latter's liability for such loss or damage, does not extend to damages accruing from change of market during a delay to deliver.³² Such a stipulation has no application where the carrier was, of necessity, aware of the loss and its extent, as where the claim is for damages caused by the negligent delay of the carrier's agent in forwarding the goods from the point of shipment,³³ or where there has been no actual delivery,³⁴ or where the injury to the goods or live stock was examined by the carrier's agent in person for the purpose of ascertaining its extent.³⁵ Such a stipulation does not apply to damages which accrued prior to the making of the contract,³⁶ or to a claim

30. *Westcott v. Fargo*, 61 N. Y. 542, 19 Am. Rep. 300.

31. *Ghormley v. Dinsmore*, 51 N. Y. Super. Ct. 196; *Wilson v. Wabash, etc., R. Co.*, 23 Mo. App. 50.

32. *Leonard v. Chicago, etc., R. Co.*, 54 Mo. App. 293.

33. *Atchison, etc., R. Co. v. Temple*, 47 Kan. 7; *Baltimore, etc., Express Co. v. Cooper*, 66 Miss. 558, 14 Am. St. Rep. 586, 40 Am. & Eng. R. Cas. 97; *Cross v. Graves*, 4 Tex. App.

Civ. Cas. § 100; *Steele v. Grand Trunk R. Co.*, 31 U. C. C. P. 260.

34. *Porter v. Southern Express Co.*, 4 S. C. 135, 16 Am. Rep. 762; *Central R. Co. v. Pickett* 67 Ga. 734, 55 Am. & Eng. R. Cas. 337.

35. *Harned v. Missouri Pac. R. Co.*, 51 Mo. App. 482; *Richardson v. Chicago, etc., R. Co.*, 1 Mo. App. Rep. 401; *Owen v. Louisville, etc., R. Co.*, 87 Ky. 626.

36. *Missouri, etc., R. Co. v. Graves*

for the value of a portion of a shipment of goods not delivered.³⁷ It will not be enforced unless its terms afford to the shipper a reasonable opportunity to present his claims.³⁸ Under the Texas statute prohibiting a railroad company or other common carrier from limiting its common law liability by special contract, it has been held that such a stipulation is valid, it not being a limitation of liability contemplated by the statute, but a matter affecting simply the shipper's remedy.³⁹ Under the Dakota statute such a stipulation is not valid unless signed by the shipper.⁴⁰ Under the Constitution of Kentucky a stipulation requiring such notice is invalid.⁴¹

§ 26. Limitation of liability as ground of defense—Pleading.

A common carrier, to avail itself of the stipulation of a bill of lading as a modification of its common law liability for loss of or injury to the goods of another while in its charge, must specially plead such stipulation as a defense.⁴² Where a carrier seeks to escape responsibility for loss or injury on the ground that it was within the exception provided by a special contract, the contract itself must be specifically pleaded and proved.⁴³ Where suit is

(Tex. App.), 16 S. W. 102; *McCarty v. Gulf, etc., R. Co.*, 79 Tex. 33, 15 S. W. 164.

37. *Galveston, etc., R. Co. v. Ball*, 80 Tex. 603, 16 S. W. 441.

38. *Missouri Pac. R. Co. v. Harris*, 67 Tex. 166; *Missouri Pac. R. Co. v. Paine* (Tex. Civ. App.), 21 S. W. 78; *St. Louis, etc., R. Co. v. Turner* (Tex. Civ. App.), 20 S. W. 1008.

39. *Gulf, etc., R. Co. v. Trawick*, 68 Tex. 314, 2 Am. St. Rep. 494, 30 Am. & Eng. R. Cas. 49.

40. *Hartwell v. Northern Pac. Express Co.*, 5 Dak. 463.

41. *Ohio, etc., R. Co. v. Tabor* (Ky.), 32 S. W. 168, 36 S. W. 18.

42. *Westcott v. Fargo*, 61 N. Y.

542, 19 Am. Rep. 300; *Pennsylvania Co. v. Yoder*, 25 Ohio C. C. R. 32.

43. *Louisville, etc., R. Co. v. Cunningham*, 88 Ill. App. 289; *Missouri Pac. R. Co. v. Wichita Wholesale Grocery Co.*, 55 Kan. 525; *Atchison, etc., R. Co. v. Ditmars*, 3 Kan. App. 459; *Clyde Steamship Co. v. Burrows*, 36 Fla. 121; *Halliday v. St. Louis, etc., R. Co.*, 74 Mo. 159, 41 Am. Rep. 311; *Oxley v. St. Louis, etc., R. Co.*, 65 Mo. 629; *Clark v. St. Louis, etc., R. Co.*, 64 Mo. 447; *Atchison, etc., R. Co. v. Bryan* (Tex. Civ. App.), 28 S. W. 98; *International, etc., R. Co. v. Moody*, 71 Tex. 614, 35 Am. & Eng. R. Cas. 607.

brought on a special contract the plaintiff must set out the contract in his declaration. But if he sues merely for breach of common law duty, the carrier must plead the special contract in order to have the benefit of its provisions.⁴⁴

§ 27. Limitation of liability as ground of defense—Presumptions and burden of proof.

A carrier has the burden of showing* that the shipper did not comply with the terms of the contract as to time of notice of loss or damages to the goods transported.⁴⁵ It must allege and prove sufficient facts to show that the shipper had opportunity to give such notice.⁴⁶ Such a contract is unreasonable and cannot be enforced unless it is made to appear that the person to be notified is so conveniently accessible to the person who is to give the notice that the latter can reasonably discharge the duty within the time limited by the contract by the exercise of fair diligence.⁴⁷ The carrier is required to prove that it had an agent or officer at the place of destination to whom the notice might have been given and in the absence of such proof the stipulation will be held unreasonable and void.⁴⁸ Such stipulations like all those which seek to

44. *Snow v. Indiana, etc., R. Co.*, 109 Ind. 422, 28 Am. & Eng. R. Cas. 77; *Tuggle v. St. Louis, etc., R. Co.*, 62 Mo. 425.

45. *St. Louis, etc., R. Co. v. Hays*, 13 Tex. Civ. App. 577, 35 S. W. 476.

46. *Houston, etc., R. Co. v. Davis*, 88 Tex. 593, 2 Am. & Eng. R. Cas. N. S. 512, 33 S. W. 510, denying writ of error in 2 Am. & Eng. R. Cas. N. S. 487, 32 S. W. 163.

47. *Missouri Pac. R. Co. v. Paine*, 1 Tex. Civ. App. 621, 21 S. W. 78. See also, *Missouri Pac. R. Co. v. Harris*, 67 Tex. 167, 28 Am. & Eng. R. Cas. 107; *Fort Worth, etc., R. Co. v. Greathouse*, 82 Tex. 104, 49 Am. & Eng. R. Cas. 157; *Missouri Pac. R.*

Co. v. Childers (Tex. Civ. App.), 29 S. W. 559; *Engesether v. Great Northern R. Co.* (Minn.), 68 N. W. 4; *Galveston, etc., R. Co. v. Short* (Tex. Civ. App.), 25 S. W. 142; *St. Louis, etc., R. Co. v. Turner*, 1 Tex. Civ. App. 625.

48. *Galveston, etc., R. Co. v. Boothe*, 3 Tex. Civ. App. Cas. § 363; *Galveston, etc., R. Co. v. Thompson* (Tex. Civ. App.), 23 S. W. 930; *Good v. Galveston, etc., R. Co.* (Tex.), 11 S. W. 854, 40 Am. & Eng. R. Cas. 98; *Galveston, etc., R. Co. v. Williams* (Tex. Civ. App.), 25 S. W. 1019; *Missouri Pac. R. Co. v. Cornwell*, 70 Tex. 611.

limit a right of action, must be definite in order to be effective. A clause which provides that the shipper will give notice "to some officer" of the carrier,⁴⁹ or that a claim must be presented within a specified time "in order to receive attention,"⁵⁰ is too vague and uncertain for a failure to present a claim to deprive a party of a right of action and will be held void for uncertainty. Compliance with the stipulation is a condition precedent to any right of action on the part of the shipper,⁵¹ and the shipper in order to recover, must show such compliance with the stipulation on his part, or a substantial compliance therewith.⁵²

§ 28. Stipulation requiring claim to be made before removal of the goods.

A stipulation or condition in a contract of shipment, whether of goods or live stock, at special rates, that the shipper will give notice in writing of any claim for loss or injury to the goods or stock, to an officer of the company or its nearest station agent, before removal of the stock or goods from the place of destination or delivery and its mingling with other stock or goods, is not unreasonable, and is valid.⁵³ But a notice within such reasonable time after removal of freight as secures the carrier from fraud is sufficient under a stipulation that the shipper must give written notice before removing the freight from the place of delivery,

49. *Smitha v. Louisville, etc., R. Co.*, 86 Tenn. 198.

50. *Dunn v. Hannibal, etc., R. Co.*, 68 Mo. 268. See *Sanford v. Housatonic R. Co.*, 11 Cush. (Mass.) 155.

51. *Westcott v. Fargo*, 61 N. Y. 542, 19 Am. Rep. 300.

52. *Atchison, etc., R. Co. v. Crittenden*, 4 Kan. App. 512; *Texas, etc., R. Co. v. Jackson*, 3 Tex. Civ. App. § 41; *Northern Pac. Express Co. v. Martin*, 26 Can. Sup. Ct. 135; *Harned v. Missouri Pac. R. Co.*, 51 Mo. App. 482; *Atchison, etc., R. Co. v. Temple*,

47 Kan. 7, 55 Am. & Eng. R. Cas. 337.

53. *Selby v. Wilmington, etc., R. Co.*, 113 N. C. 588, 18 S. E. 88, 37 Am. St. Rep. 635. See *Capehart v. Seaboard, etc., R. Co.*, 81 N. C. 438, 31 Am. Rep. 505, where a clause requiring goods to be examined before leaving the station, as applied to a car load of cotton, was held to be invalid as being unreasonable. See also, *Carriers of Live Stock*, chap. 21, as to contracts for the transportation of cattle wherein stipulations of this character are usually found.

if he could not discover the injury before removal.⁵⁴ A provision of a bill of lading that "the shipowner is not to be liable * * * for any claim, notice of which is not given before the removal of the goods," even if conceded to be unreasonable and void as to the time within which it requires the notice to be given, is valid, and will be enforced to the extent of requiring notice to be given, and it must be given within a reasonable time, or the right to recover on a claim for damage to the goods will be barred.⁵⁵

§ 29. Limitation of liability to forwarder or warehouseman.

A carrier may agree with a shipper of goods that the liability of the carrier from the time of the arrival of the goods at the station or port at their place of destination, shall be that of a warehouseman only, and such stipulations have been held by the courts to be reasonable and valid.⁵⁶ A carrier may, by special contract, limit its liability for goods sent C. O. D., while in its possession for purposes of collection only, to that of a warehouseman.⁵⁷ A shipping receipt limiting the liability of an express company for loss as forwarders only, and within its own lines of communication, and not for any default of connecting companies, does not relieve it of liability for a wrongful delivery.⁵⁸ Where a carrier gave a shipper a receipt providing that the carrier acted as a forwarder only, and should not be liable for any loss or damage except from fraud or gross negligence, the stipulation did not govern the lia-

54. *Western R. Co. v. Harwell* (Ala.), 45 Am. & Eng. R. Cas. 358, 8 So. 649; *Ormsby v. Union Pac. R. Co.*, 4 Fed. 170; *Memphis, etc., R. Co. v. Holloway*, 9 Baxt. (Tenn.) 188.

55. *The St. Hubert*, 102 Fed. 362.

56. *Feige v. Michigan Cent. R. Co.*, 62 Mich. 1; *Constable v. National Steamship Co.*, 154 U. S. 51, 38 L. Ed. 903, 14 Sup. Ct. Rep. 1062; *Western R. Co. v. Little*, 86 Ala. 159, 37 Am. & Eng. R. Cas. 660; *South, etc.*,

Alabama R. Co. v. Wood, 66 Ala. 167, 41 Am. Rep. 749, 9 Am. & Eng. R. Cas. 419; *Husten v. Peters*, 1 Metc. (Ky.) 558. Compare *Louisville, etc., R. Co. v. Oden*, 80 Ala. 38.

57. *Pacific Express Co. v. Wallace*, 60 Ark. 100.

58. *Security Trust Co. v. Wells, Fargo & Co. Express*, 178 N. Y. 620, 70 N. E. 1109, affg. judg. 81 App. Div. (N. Y.) 426, 80 N. Y. Supp. 830.

bility of the carrier for failure to return the goods, when ordered so to do by the shipper, during their transportation.⁵⁹ A stipulation in the bill of lading that the carrier shall not be liable except as warehouseman while the property awaits further conveyance, and that no carrier shall be liable after the property is ready for delivery to the next carrier, is, it seems, not contrary to public policy.⁶⁰ Where a connecting carrier permitted flour to remain in its warehouse for forty-nine days before forwarding the same because of a shortage of cars, without notifying the shipper, knowing that the detention would be unusual, thereby preventing the shipper from protecting itself by insurance, and the flour was totally or partially destroyed by the burning of the warehouse, the carrier was chargeable with such negligence as made it responsible for the loss of the flour, notwithstanding a provision in the bill of lading that no carrier should be liable for the loss of goods or damage thereto by fire.⁶¹ A carrier acted as a warehouseman in receiving goods in its parcel room for safe keeping, and had a right to limit its liability to ten dollars in case of loss of the goods, so that a receipt containing such limitation was binding upon the owner, and limited his recovery to that amount.⁶² Where a statement of claim alleges that defendant is a common carrier, the defendant cannot relieve itself from liability, if it is in fact a common carrier, by inserting in its bill of lading a clause to the effect that it shall be held liable only as forwarder.⁶³ A contract stipulating that the carrier shall not be liable for loss after the goods are ready for delivery to the consignee, and that goods not removed by the consignee within twenty-four hours after arrival may be kept by the carrier at the risk of the consignee, etc., does

59. *Rosenthal v. Weir*, 54 App. Div. (N. Y.) 275, 66 N. Y. Supp. 841, judg. affd. 170 N. Y. 148, 63 N. E. 65, 57 L. R. A. 527.

60. *Washburn-Crosby Co. v. Boston & A. R. Co.*, 180 Mass. 252, 62 N. E. 590.

61. *Erie R. Co. v. Star & Crescent*

Milling Co., 162 Fed. 879, 89 C. C. A. 569.

62. *Terry v. Southern Ry. Co.*, 81 S. C. 279, 62 S. E. 249, 18 L. R. A. (N. S.) 295.

63. *Blakiston v. Davies, Turner & Co.*, 42 Pa. Super. Ct. 390.

not terminate the liability as carrier, on the carrier checking up the car containing the goods, and making up a record thereof within a few minutes after the arrival of the car, thereby making the goods ready for delivery to the consignee; but until notice is given to the consignee, or until a reasonable time has elapsed, within which he may receive the goods, the liability continues.⁶⁴

§ 30. Limitation of amount of liability.—In general.

The early English cases held that a carrier might limit the amount of its liability by a simple notice.⁶⁵ The early New York cases recognized this right while holding that a carrier could not restrict its common law liability in other respects, even by express contract.⁶⁶ The later cases are somewhat at variance as to whether the liability of the carrier as to amount can be limited by notice to the shipper. While a public notice is generally held insufficient to discharge the common carrier from its legal liability, unless expressly assented to by the shipper, in respect to those duties designed simply to enjoin good faith and fair dealing, a notice alone, if distinctly brought home to the knowledge of the owner of the property delivered for carriage, will be sufficient.⁶⁷ But it is now almost universally held, following the leading case,⁶⁸ that

64. *Podrat v. Narragansett Pier R. Co.*, 32 R. I. 255, 78 Atl. 1041.

65. *Maving v. Todd*, 1 Stark. 72; *Harris v. Packwood*, 3 Taunt. 264; *Batson v. Donovan*, 4 B. & Ald. 21.

66. *Hollister v. Nowlen*, 19 Wend. (N. Y.) 234; *Cole v. Goodwin*, 19 Wend. (N. Y.) 251; *Orange County Bank v. Brown*, 9 Wend. (N. Y.) 85.

67. *Doyle v. Baltimore, etc., R. Co.*, 126 Fed. 841; *Moses v. Boston, etc., R. Co.*, 24 N. H. 85, 55 Am. Dec. 222; *Farmers, etc., Bank v. Champlain Transp. Co.*, 23 Vt. 186, 56 Am. Dec. 68; *Oppenheimer v. United States Express Co.*, 69 Ill. 62, 18 Am. Rep. 96; *Western Transp. Co. v. Newhall*, 24

Ill. 466, 72 Am. Dec. 760. See § 3 and cases there cited.

68. *Hart v. Pennsylvania R. Co.*, 112 U. S. 331, 5 Sup. Ct. 151, 28 L. Ed. 717, 18 Am. & Eng. R. Cas. 604. In this case the court said: "There is no justice in allowing the shipper to be paid a large value for an article which he has induced the carrier to take at a low rate of freight on the assertion and agreement that its value is a less sum than that claimed after a loss. It is just to hold the shipper to his agreement, fairly made, as to value, even where the loss or injury has occurred through the negligence of the carrier. The effect

a common carrier may, by special contract, limit the amount of its liability for loss occurring even from its own negligence, the contract being fairly made, signed, or agreed to by the shipper, and the rate of freight charged being based on the agreed valuation. Such a contract is in no sense a limitation of the carrier's liability for the results of its own negligence, but, fairly entered into, leaves the carrier responsible for its negligence, and simply fixes the rate of freight and liquidates the damages.⁶⁹ In some of the States a

of the agreement is to cheapen the freight and secure the carriage, if there is no loss; and the effect of disregarding the agreement, after a loss, is to expose the carrier to a greater risk than the parties intended he should assume. The agreement as to value in this case stands as if the carrier had asked the value of the horses, and had been told by the plaintiff the sum inserted in the contract."

"The limitation as to value has no tendency to exempt from liability for negligence. It does not induce want of care. It exacts from the carrier the measure of care due to the value agreed on. The carrier is bound to respond in that value for negligence. The compensation for carriage is based on that value. The shipper is estopped from saying that the value is greater. The articles have no greater value for the purpose of the contract of transportation between the parties to that contract. The carrier must respond for negligence up to that value. It is just and reasonable that such a contract fairly entered into, and where there is no deceit practiced on the shipper, should be upheld. There is no violation of public policy. On the contrary, it would be unjust and un-

reasonable, and would be repugnant to the soundest principles of fair dealing and of the freedom of contracting, and thus in conflict with public policy, if a shipper should be allowed to reap the benefit of the contract if there is no loss, and to repudiate it in case of loss."

69. *U. S.*—A written contract between a shipper and a common carrier, by which it is stipulated, in consideration of a reduced rate of carriage, that the value of the articles shipped shall be limited to a stated amount, is not void as against public policy, as relieving the carrier from liability for negligence. *Jennings v. Smith*, 106 Fed. 139, 45 C. C. A. 249. See also, *Muser v. Holland*, 17 Blatchf. (U. S.) 412, 1 Fed. 382; *Earnest v. Express Co.*, 1 Woods (U. S.), 573; *Hopkins v. Westcott*, 6 Blatchf. (U. S.) 64. Compare *Eells v. St. Louis, etc., R. Co.*, 52 Fed. 903; *Scruggs v. Baltimore, etc., R. Co.*, 18 Fed. 318.

Ala.—The limitation as to amount is valid where it is a fair valuation of the goods shipped and is virtually a liquidation of the damages. *Western R. Co. v. Harwell*, 97 Ala. 341. And this although the loss may have been due to the carelessness of the carrier's servants. *Louisville, etc.,*

stipulation fixing an amount beyond which the carrier will not

R. Co. v. Sherrod, 84 Ala. 178, 4 So. 29. A shipper may agree, in consideration of special rates or privileges, on values in case of loss or injury, if the agreed values are not unreasonable or arbitrary, and no agreement is made exempting the carrier from the consequences of negligence or bad faith. *Georgia Pac. R. Co. v. Hughart*, 90 Ala. 36, 8 So. 62; *Alabama, etc., R. Co. v. Little*, 71 Ala. 611, 12 Am. & Eng. R. Cas. 37; *Mobile, etc., R. Co. v. Hopkins*, 41 Ala. 486, 94 Am. Dec. 607; *South, etc., Alabama R. Co. v. Henlein*, 52 Ala. 615, 23 Am. Rep. 578; *Louisville, etc., R. Co. v. Grant*, 99 Ala. 325, 55 Am. & Eng. R. Cas. 356; *Louisville, etc., Co. v. Kelsey*, 89 Ala. 287, 42 Am. & Eng. R. Cas. 584.

Ark.—*St. Louis, etc., R. Co. v. Weakly*, 50 Ark. 397, 7 Am. St. Rep. 104, 35 Am. & Eng. R. Cas. 635; *St. Louis, etc., R. Co. v. Lesser*, 46 Ark. 236.

Conn.—A statement of the value of a horse shipped, made by the shipper in answer to the carrier's inquiry, which value is inserted in the bill of lading, is conclusive on him as to the value of the horse in an action against the carrier for its loss, although the bill of lading is silent as to the effect of such valuation on the carrier's liability, and the shipper has no actual information, and did not suppose that his statement would affect the amount of the carrier's liability. *Coupland v. Housatonic R. Co.*, 61 Conn. 531, 55 Am. & Eng. R. Cas. 381, 15 L. R. A. 534, 33 Atl. 870.

Del.—A rule of a carrier that its liability is limited by the rate of freight paid on shipments is binding on shippers having notice. *Klair v. Wilmington Steamboat Co.* (Del. Super.), 54 Atl. 694.

Ga.—Though a railway company in its capacity as a common carrier may, as the basis for fixing its charges and limiting the amount of its corresponding liability, lawfully make with a shipper a contract of affreightment embracing an actual and bona fide agreement as to the value of the property to be transported, and in such case the latter, when loss, damage, or destruction occurs, will be bound by the "agreed valuation," a mere general limitation as to value expressed in a bill of lading, and amounting to no more than "arbitrary preadjustment of the measure of damages," will not, though the shipper assents in writing to the terms of the document, serve to exempt a negligent carrier from liability for the true value. *Central of Georgia R. Co. v. Murphy*, 113 Ga. 514, 53 L. R. A. 720, 38 S. E. 970. See also, *Wood v. Southern Express Co.*, 95 Ga. 451; *Georgia R., etc., Co. v. Keener*, 93 Ga. 808, 44 Am. St. Rep. 197; *Savannah, etc., R. Co. v. Sloat*, 93 Ga. 808.

Ill.—As to losses resulting from the gross negligence of the carrier such a provision is void, but as to all other losses it is valid, if freely and fairly entered into by the shipper or his agent. *Chicago, etc., R. Co. v. Chapman*, 133 Ill. 96, 23 Am. St. Rep. 587, 42 Am. & Eng. R. Cas. 392;

be liable is not enforceable where the loss results from the negli-

Oppenheimer v. United States Express Co., 69 Ill. 62; *Adams Express Co. v. Stettaners*, 61 Ill. 184, 14 Am. Rep. 57; *Chicago, etc., R. Co. v. Harmon*, 12 Ill. App. 54.

Ind.—Where the parties to a contract of shipment fix the value of the property to be transported, by a contract freely and fairly made, and supported by a good consideration, such value, so fixed, may be made the measure of the carrier's liability; but, in order to make the stipulation effective, there must be some other consideration than the original contractual relations between the parties. *Evansville, etc., R. Co. v. Kevekordes* (Ind. App.), 69 N. E. 1022; *Adams Express Co. v. Carnahan* (Ind. App.), 63 N. E. 245, 64 N. E. 647. See also, *Rosenfeld v. Peoria, etc., R. Co.*, 103 Ind. 121, 53 Am. Rep. 500, 21 Am. & Eng. R. Cas. 89; *Adams Express Co. v. Harris*, 120 Ind. 73, 16 Am. St. Rep. 315, 40 Am. & Eng. R. Cas. 151; *Michigan Southern, etc., R. Co. v. Heaton*, 37 Ind. 448, 10 Am. Rep. 89; *Baltimore, etc., R. Co. v. Ragsdale*, 14 Ind. App. 406; *Bartlett v. Pittsburgh, etc., R. Co.*, 94 Ind. 281, 18 Am. & Eng. R. Cas. 549.

Kan.—A contract fixing the value of the goods delivered to the carrier, or fixing a limitation of damage in case of loss or injury, is clearly reasonable as affecting the risk and the degree of care required concerning the property to be transported. *Pacific Express Co. v. Foley*, 46 Kan. 457, 26 Am. St. Rep. 107, 46 Am. & Eng. R. Cas. 690. See also *Atchison,*

etc., R. Co. v. Dill, 48 Kan. 210, 55 Am. & Eng. R. Cas. 375; *Kansas City, etc., R. Co. v. Simpson*, 30 Kan. 645, 16 Am. & Eng. R. Cas. 158, 46 Am. Rep. 104; *Kallman v. United States Express Co.*, 3 Kan. 205, overruled by case first cited.

Mass.—*Hill v. Boston, etc., R. Co.*, 144 Mass. 284, 28 Am. & Eng. R. Cas. 87; *Graves v. Lake Shore, etc., R. Co.*, 137 Mass. 33, 50 Am. Rep. 282; *Squire v. New York Cent. R. Co.*, 98 Mass. 245, 93 Am. Dec. 162; *Judson v. Western R. Co.*, 6 Allen (Mass.), 486.

Mich.—*Smith v. American Express Co.* (Mich.), 66 N. W. 479.

Mo.—A contract limiting a right of recovery to a sum agreed upon by the parties does not in any degree exempt the carrier from the consequences of its own negligence, and is binding. *Harvey v. Terre Haute, etc., R. Co.*, 74 Mo. 538. But not unless made in consideration of a reduced rate. *McFadden v. Missouri Pac. R. Co.*, 92 Mo. 343, 1 Am. St. Rep. 721, 30 Am. & Eng. R. Cas. 17. See also, *Connover v. Pacific Express Co.*, 40 Mo. App. 31. Stipulations in a bill of lading that in case the goods are lost or damaged, the amount of the loss or damage shall be computed at the place and time of shipment, apply to injury during shipment, and do not apply to loss occurring through the carrier's failure to deliver the goods in a reasonable time. *D. Klass Commission Co. v. Wabash R. Co.*, 80 Mo. App. 164, 2 Mo. App. Repr. 545.

Ohio.—A contract limiting the

gence of the carrier. In such cases the shipper or owner may prove the full value of the property and recover accordingly.⁷⁰

amount of the liability of a common carrier for the loss of goods carried, even if the loss is due to negligence, is not contrary to public policy. *Bal-lou v. Earle*, 27 Ohio L. J. 83, 22 Atl. 1 113 14 L. R. A. 433, 48 Am. & Eng. R. Cas. 31.

N. H.—*Duntley v. Boston, etc., R. Co.*, 66 N. H. 263; *Durgin v. American Express Co.*, 66 N. H. 277, 45 Am. & Eng. R. Cas. 327.

R. I.—*Ballou v. Earle*, 17 R. I. 441, 33 Am. St. Ry. 881, 48 Am. & Eng. Ry. Cas. 31.

S. C.—*Johnstone v. Richmond, etc., R. Co.*, 39 S. C. 55, 55 Am. & Eng. R. Cas. 346.

Tenn.—*Starnes v. Louisville, etc., R. Co.*, 91 Tenn. 516, 55 A. & Eng. R. Cas. 355; *Louisville, etc., R. Co. v. Sowell*, 90 Tenn. 17, 49 Am. & Eng. R. Cas. 166. But see *Louisville, etc., R. Co. v. Gilbert*, 88 Tenn. 431, 42 Am. & Eng. R. Cas. 372; *Louisville, etc., R. Co. v. Wynn*, 88 Tenn. 330, 45 Am. & Eng. R. Cas. 312; *Coward v. East Tennessee, etc., R. Co.*, 16 Lea. (Tenn.) 225, 57 Am. Rep. 227.

Va.—*Richmond, etc., R. Co. v. Payne*, 86 Va. 481, 42 Am. & Eng. R. Cas. 370.

W. Va.—*Zouch v. Chesapeake, etc., R. Co.*, 36 W. Va. 524, 49 Am. & Eng. R. Cas. 712; *Maslin v. Baltimore, etc., R. Co.*, 14 W. Va. 180, 35 Am. Rep. 748.

70. *Iowa.*—*McCune v. Burlington, etc., R. Co.*, 52 Iowa 600. The limitation, in a contract of shipment of a horse, of the carrier's liability to \$100, the "released value of the

horse named in the contract, rendering the contract void, under Code, § 2074, providing no contract shall exempt a railway from liability of a common carrier which would exist had no contract been made, fraud of the shipper in making representations to secure a cheaper rate of freight will not prevent his proving the full value of the horse. *Lucas v. Burlington, etc., R. Co.*, (Iowa), 84 N. W. 673.

Ky.—*Baughman v. Louisville, etc., R. Co.*, 94 Ky. 150, 55 Am. & Eng. R. Cas. 353; *Louisville, etc., R. Co. v. Owen*, 93 Ky. 201, 19 S. W. 590; *Adams Express Co. v. Hoeing*, 88 Ky. 373; *Orndorff v. Adams Express Co.*, 3 Bush (Ky.) 194, 96 Am. Dec. 207.

Minn.—A carrier cannot limit its liability for its own negligence by contract, either as to the right or the amount of recovery. *Boehl v. Chicago, etc., R. Co.* 44 Minn. 191, 45 Am. & Eng. R. Cas. 351, 46 N. W. 333; *Moulton v. St. Paul, etc., R. Co.*, 31 Minn. 86, 47 Am. Rep. 781, 12 Am. & Eng. R. Cas. 13.

A stipulation fixing the value of live stock in a carrier's contract, if fairly made as the basis of the rate of compensation for the carrier's services and risks, will constitute the limit of recovery for loss of the stock, although it is caused by the carrier's negligence; but such limitation is invalid in case of negligence, if its purpose was merely to limit the amount of the carrier's liability. *Alair v. Northern Pac. R. Co.*, 53 Minn. 160, 39 Am. St. Rep. 588, 55

But in such cases a distinction is made between contracts limiting

Am. & Eng. R. Cas. 357, 19 L. R. A. 764, 54 N. W. 1072. See also J. J. Douglass Co. v. Minnesota Transfer R. Co., 62 Minn. 288, 30 L. R. A. 860, 64 N. W. 899, 2 Am. & Eng. R. Cas. N. S. 671.

Miss.—Southern Express Co. v. Seide, 67 Miss. 613, 42 Am. & Eng. R. Cas. 398; Chicago, etc., R. Co. v. Abels, 60 Miss. 1024, 21 Am. & Eng. R. Cas. 105; Chicago, etc., R. Co. v. Moss, 60 Miss. 1003, 45 Am. Rep. 428; Southern Express Co. v. Moon, 39 Miss. 822.

Neb.—Chicago, etc., R. Co. v. Witty, 32 Neb. 275, 29 Am. St. Rep. 436, 49 Am. & Eng. R. Cas. 169.

Ohio.—United States Express Co. v. Backman, 28 Ohio St. 144; Ambach v. Baltimore, etc., R. Co., 30 Ohio L. J. 111.

Pa.—If the valuation is an agreed one, made in consideration of reduced charges, it will bind the shipper. But otherwise any stipulation fixing the limit of the carrier's liability in case of loss or injury is void, if the loss is the result of the carrier's negligence. Weiller v. Pennsylvania R. Co., 234 Pa. St. 310, 19 Am. St. Rep. 700, 42 Am. & Eng. R. Cas. 390, 26 W. N. C. (Pa.) 27; Grogan v. Adams Express Co., 114 Pa. St. 523, 60 Am. Rep. 360, 30 Am. & Eng. R. Cas. 10. See also Elkins v. Empire Transp. Co., 81 Pa. St. 315; American Express Co., v. Sands, 55 Pa. St. 140; Farnham v. Camden, etc., R. Co., 55 Pa. St. 53; Adams Express Co. v. Holmes (Pa.), 9 Atl. 166, 30 Am. & Eng. R. Cas. 14.

Stipulation in a contract to carry goods that, in case of damage through the carrier's negligence, it shall have the benefit of any insurance effected on the goods, is valid, so as to entitle the carrier to a deduction for insurance paid the shipper. Roos v. Philadelphia, etc., R. Co., 199 Pa. 378, 49 Atl. 344.

Tex.—Pacific Express Co. v. Ross, (Tex. Civ. App) 154 S. W. 340. A stipulation in the contract of carriage limiting the carrier's liability to a value fixed in the contract is not binding, when the goods are injured through the carrier's negligence, in the absence of a statute permitting such a limitation of liability. Southern Pa. Co. v. Anderson (Tex. Civ. App.), 63 S. W. 1023. See also Louisville, etc., R. Co. v. Robbins, 4 Tex. App. Civ. Cas., § 43.

A stipulation in the contract of shipment limiting the liability to value at the place of shipment will be disregarded, as against public policy, notwithstanding it was an interstate shipment, where it is shown that the loss was the result of the carrier's negligence. Southern Pac. Co. v. D'Arcais (Tex. Civ. App.), 64 S. W. 813.

Wis.—Even the transportation of goods at an agreed valuation, if it can be construed into a simple agreement limiting the liability of the carrier, will have no application where the goods are lost or injured through the carrier's negligence. Black v. Goodrich Transp. Co., 55 Wis. 319, 42 Am. Rep. 713. See also Abrams v. Milwaukee, etc., R. Co., 87

the liability of the carrier for loss or damage to the subject of carriage to an arbitrary sum of money not fixed with reference to the agreed actual or maximum value of the property, which are held to be an unlawful limitation of the carrier's liability for negligence, and contracts, fairly made between the carrier and shipper, liquidating such loss or damage in advance on an actual or maximum value basis agreed on and stated in the contract, and constituting the basis upon which freight charges are calculated, which are held to be valid as simply limiting the liability for loss or damage, attributable to the carrier's negligence, to actual loss on such a basis, the agreed value being taken as the maximum or actual value of the property.⁷¹ The carrier has the right to demand from the consignor such information as will enable it to decide on the proper compensation to charge for the risk, and the degree of care to bestow on its trust, and a limitation of its liability in a bill of lading to a specified amount, unless the value of goods forwarded is truly stated if coupled with compensating advantages to the consignor and brought to his knowledge, and the latter has the alternative of getting rid of the limitation by paying a reasonably higher freight rate, is reasonable and consistent with public policy.⁷² In New York the rule is now well settled that where a shipper of property enters into a contract with a common carrier whereby, in consideration of an agreement of the latter to transport the property at reduced rates, it is stipulated that, in the event of loss or injury resulting from causes

Wis. 485, 41 Am. St. Rep. 55; *Boorman v. American Express Co.*, 21 Wis. 154.

71.—*Ullman v. Chicago, etc.*, R. Co. 112 Wis. 168, 88 N. W. 41; *Louisville, etc., R. Co. v. Wynn*, 88 Tenn. 330, 45 Am. & Eng. R. Cas. 312; *Johnstone v. Richmond, etc., R. Co.*, 39 S. C. 55, 55 Am. & Eng. R. Cas. 346. See also cases cited under last preceding note.

72. *Oppenheimer v. United States Express Co.*, 69 Ill. 62, 18 Am. Rep. 596; *Louisville, etc., R. Co. v. Manchester Mills*, 88 Tenn. 653, 14 S. W. 314; *Richmond, etc., R. Co. v. Payne*, 86 Va. 481, 42 Am. & Eng. R. Cas. 366, 10 S. E. 749, 6 L. R. A. 849, 14 Va. L. J. 82. See also cases cited note 69, *supra*.

which would make the carrier liable, the liability will be limited to an amount not exceeding a valuation specified, the shipper in case of loss or injury is not entitled to recover more than the sum specified, and that such a limitation in the bill of lading will protect the carrier even though the loss or injury is the result of negligence.⁷³ But the courts do not favor these contracts, and general words will not be construed to accomplish this result. Considerations of public policy demand that common carriers should discharge fully their duties to the public, and give adequate notice of any immunity from the common law obligations, and conditions of bills of lading or other contracts intended to limit liability come properly within the rule that the words are to be taken most strongly against the party whose language they are, and who is in an advantageous position in fixing the terms of the contract.⁷⁴ But the courts make the distinction that the common carrier has two distinct liabilities,—the one for losses by accident or mistake, where it is liable by the custom of the realm or the common law, as an insurer; the other, for losses by default or negligence, where it is answerable as an ordinary bailee.⁷⁵ In cases where the property transported is of unusual or extraordinary value, a notice that the carrier will not be responsible for

73. *Zimmer v. New York, etc., R. Co.*, 137 N. Y. 460, 55 Am. & Eng. R. Cas. 354; *Magnin v. Dinsmore*, 70 N. Y. 410, 20 Am. Rep. 608; *Belger v. Dinsmore*, 51 N. Y. 166, 10 Am. Rep. 575, and in the absence of fraud, concealment or improper practice, the legal presumption is that stipulations limiting the common law liability of common carriers, contained in a receipt given by them for freight were known and assented to by the party receiving it. So held also of stipulations contained in the ticket of a passenger by steamship for a foreign

port. *Steers v. Liverpool, etc., R. Co.*, 57 N. Y. 1, 15 Am. Rep. 453.

74. *Westcott v. Fargo*, 61 N. Y. 542, 19 Am. Rep. 300.

75. *Wheeler v. Oceanic Steam Nav. Co.*, 125 N. Y. 155, 26 N. E. 248, 21 Am. St. Rep. 729; *Dorr v. New Jersey Steam Nav. Co.*, 4 Sandf. (N. Y.) 145, 11 N. Y. 485, 62 Am. Dec. 125; *Lamb v. Camden, etc., R. Co.*, 46 N. Y. 278, 7 Am. Rep. 387. See also *Kenney v. New York Cent., etc., R. Co.*, 125 N. Y. 422, 26 N. E. 626; *Jennings v. Grand Trunk R. Co.*, 127 N. Y. 438, 28 N. E. 394.

loss if the true character or value of the articles is not stated at the time of shipment unless extra freight is paid, will operate to exempt the carrier from liability even for its own negligence, on the theory that silence on the part of the shipper, under such circumstances, is such a fraudulent concealment from the carrier of a material fact affecting its liability as to exempt it from its obligation to transport with due care.⁷⁶ But where a bill of lading limited the liability of a carrier simply as a carrier of goods, its liability as bailee for hire remained unimpaired, so that, though it was not liable as carrier beyond the amount named in the contract, it was liable as bailee for the full value of the goods when negligently injured.⁷⁷ It is violated duty that furnishes the ground for an action of negligence,⁷⁸ and the damages in an action of negligence cannot be fixed by the contract of carriage, unless the carrier show its immunity on the face of its agreement.⁷⁹ An action against a common carrier to recover

76. *Rathbone v. New York Cent., etc., R. Co.*, 140 N. Y. 48, 35 N. E. 418.

77. *Bermel v. New York, etc., R. Co.*, 172 N. Y. 639, 65 N. E. 1113, affg. 62 App. Div. (N. Y.) 389, 70 N. Y. Supp. 804. See also New York authorities cited in preceding notes to this section.

78. *Brewer v. New York, etc., R. Co.*, 124 N. Y. 59, 26 N. E. 324, 11 L. R. A. 483, 21 Am. St. Rep. 647.

79. *Nicholas v. New York Cent., etc., R. Co.*, 89 N. Y. 370; *Wells v. Steam Nav. Co.*, 8 N. Y. 375.

Where a carrier loses all trace of goods admittedly received by it, it is liable to the owner for their value, and such liability is not affected by a receipt providing for a liability of \$50 only unless a greater value is stated; such receipt containing no stipulation relieving the carrier from

negligence. *Blum v. Monahan*, 36 Misc. Rep. (N. Y.) 179, 73 N. Y. Supp. 162.

Such a receipt does not protect the carrier against its own negligence, especially in the absence of explanation of non-delivery. *Simon v. Dunlap's Express Co.*, 38 Misc. Rep. (N. Y.) 775, 78 N. Y. Supp. 1136.

But the carrier can claim the benefit of a contract of carriage limiting its liability to a certain sum, unless the true value of the goods is stated, where it showed that, where the value of the goods was stated or known to be in excess of that sum, it took special care of them, and made special arrangements for their delivery, and made an additional charge, and the shippers failed to show any affirmative act of wrongdoing on the carrier's part. *Hirsch v. New York Dispatch & Delivery*

damages for its negligence in delivering goods after a proper and timely notice from the shipper to stop them *in transitu*, which it agreed to do, is founded upon the tortious act of the carrier, not upon the contract of carriage under which the goods had been shipped, which must be regarded as having ended upon the receipt of the notice and the possession of the goods as having revested in the shipper, the carrier holding them as bailee; and, therefore, a limitation in the contract of carriage of the carrier's liability for loss to an amount specified therein will not preclude a recovery to the extent of the value of the goods.⁸⁰ But where a package given an express company was lost by it, and no explanation given, and the receipt issued by the carrier stipulated that the carrier should not be liable for damages unless the result of gross negligence or fraud, and that the shipper should not demand more than fifty dollars, unless otherwise expressed in the receipt, and the shipper made no statement of value, and none was expressed in the receipt, the shipper could recover no more than fifty dollars, though the actual value of the package was greater, where the loss resulted from ordinary negligence.⁸¹ A limitation of liability to a valuation agreed upon to determine which of two rates shall apply to a particular shipment is not forbidden in Carmack

Co., 85 N. Y. Supp. 198; Rowan v. Wells Fargo & Co., 80 App. Div. (N. Y.) 31, 80 N. Y. Supp. 226; Maguin v. Dinsmore, 70 N. Y. 410, 26 Am. Rep. 608.

80. Rosenthal v. Weir, 170 N. Y. 148, 63 N. E. 65, 57 L. R. A. 527, affg. 54 App. Div. (N. Y.) 275, 66 N. Y. Supp. 841; Cross v. O'Donnell, 44 N. Y. 661, 4 Am. Rep. 721; Pennsylvania R. Co. v. American Oil Works, 126 Pa. St. 485, 12 Am. St. Rep. 885, 17 Atl. 671; Reynolds v. Railroad Co., 43 N. H. 580; Jones v. Earl, 37 Cal. 630, 99 Am. Dec. 338; Litt. v. Cowley, 7 Taunt. 169, 23 Eng. R. Cas. 411.

81. Wilson v. Platt, 84 N. Y. Supp. 143; Bernstein v. Weir, 40 Misc. Rep. (N. Y.) 635, 83 N. Y. Supp. 48. In the latter case the shippers filled out in their own blank freight receipt books, printed by an express company, a receipt, describing the freight, the consignee, and his address, and tendered it to an employe of the express company for signature, at the shipper's store, and the employe signed and returned it, and it was held to constitute a special contract, whose conditions were binding on the principals.

Amendment June 29, 1906, § 7, to Act Feb. 4, 1887, § 20, providing that no receipt shall exempt a common carrier from the liability thereby imposed. The shipper and carrier of an interstate shipment are not forbidden to contract to limit the carrier's liability to an agreed value to adjust the rate.⁸² Inquiry as to the

82. *U. S.*—*Kansas City Southern R. Co. v. Carl*, 227 U. S. 639, 33 Sup. Ct. 391, 57 L. Ed. —; *Missouri, etc., R. Co. v. Harriman Bros.*, 227 U. S. 657, 33 Sup. Ct. 397, 57 L. Ed. —; *Adams Express Co. v. Croninger*, 226 U. S. 491, 33 Sup. Ct. 148, 57 L. Ed. —; *Chicago, etc., Ry. Co. v. Latta*, 226 U. S. 519, 33 Sup. Ct. 155, 57 L. Ed. —; *Chicago, etc., Ry. Co. v. Miller*, *id.*

A case of valuation to adjust the rate and not of exemption from liability for negligence, forbidden by the Carmack amendment, is presented where the shipper delivered to the initial carrier an agreement to release all liability in excess of \$5 per hundred pounds, for household goods, carrier's tariff sheets on file showing two rates on household goods, one when released to \$5 per hundred pounds and the higher rate when not so released, and the rate indorsed being such lower rate. *Kansas City Southern R. Co. v. Carl*, *supra*.

Ark.—*United States Express Co. v. Cohn*, — Ark. — 157 S. W. 144, under the amendment of Act of Congress, June 29, 1906, to the Interstate Commerce Act, permitting an express company engaged in interstate commerce to limit its liability for loss of goods to a stated value, in consideration of a reduced rate, the consignee

of a lost interstate shipment is entitled to recover only the amount as limited by the receipt. See *contra*: *St. Louis, etc., R. Co. v. Pape*, 100 Ark. 269, 140 S. W. 265.

Colo.—*J. S. Appel Suit & Cloak Co. v. Platt*, — Colo. —, 132 Pac. 71, an express contract with reference to interstate shipments, valuing packages transported at the lowest rate to \$50, and limiting the company's liability in case of loss to that sum, is valid.

Ga.—*Louisville & N. R. Co. v. Warfield & Lee*, 6 Ga. App. 550, 65 S. E. 308.

Iowa.—*Winn v. American Express Co.*, 149 Iowa, 259, 128 N. W. 663.

Kan.—*Southern Nursery Co. v. Winfield Nursery Co.*, 89 Kan. 522, 132 Pac. 149, an interstate carrier may by a reasonable agreement limit the amount recoverable by the shipper to an agreed value understated to obtain the lower of two or more rates proportioned to the risk.

Mass.—*Coleman v. New York, etc., R. Co.*, — Mass. —, 102 N. E. 92, a provision in a bill of lading that the amount of loss for which any carrier would be liable should be computed on the basis of the value of the property (being the *bona fide* invoice price if any to the consignee), is not contrary to public policy, and is within the principles applicable to interstate commerce under federal statutes. See also, *New England News*

actual value of an interstate shipment is not vital to the fairness,

Co. v. Metropolitan S. S. Co., — Mass. —, 102 N. E. 423.

Mich.—Harrison Granite Co. v. Grand Trunk Ry. System.— *Mich. —*, 141 N. W. 642.

Special contracts, by which the shipper gives a lower valuation of property in consideration of a reduced rate of transportation, are an adjustment beforehand of the damages from negligence and are valid, except in case of gross negligence on the part of the carrier; such contracts having no tendency to exempt from liability for negligence, being contracts fixing the damages and not limiting the carrier's liability and not contrary to public policy. *Id.*

Minn.—Carpenter v. United States Express Co., 120 Minn. 59, 139 N. W. 154, the Carmack Amendment to the Hepburn Act does not prevent a carrier from making valid contracts limiting liability, according to the agreed value, upon interstate shipments under legal tariff rates.

Miss.—American Express Co. v. Burke & McGuire, — *Miss. —*, 61 So. 312, one who makes an interstate shipment under a common express receipt limiting the carrier's liability to \$50 can only recover that amount as damages for the carrier's failure to properly deliver this article.

Mo.—American Silver Mfg. Co. v. Wabash R. Co., — *Mo. App. —*, 156 S. W. 830, where freight was shipped in interstate commerce at a rate granted on condition that the carrier's liability be limited to ten times the freight, such limitation was valid under the Interstate Commerce

Act and its amendments, and in the absence of fraud fixed the amount of plaintiff's recovery in an action on the contract for loss of the goods.

N. J.—Travis v. Wells, Fargo & Co., 79 N. J. Law, 83, 74 Atl. 444.

N. Y.—United Lead Co. v. Lehigh Valley R. Co., 141 N. Y. Supp. 310; Gardiner v. New York Cent., etc., R. Co., 201 N. Y. 387, 94 N. E. 876, *aff'g* order 139 App. Div. 17, 123 N. Y. Supp. 865, and answering certified question, 140 App. Div. 907, 125 N. Y. Supp. 1121, a clause in a contract of shipment in consideration of reduced rates limiting the liability of a carrier to a specified valuation will include loss arising from negligence without express mention thereof; United Lead Co. v. Lehigh Valley R. Co., 141 N. Y. Supp. 310.

Contra: Vigouroux v. Platt, 115 N. Y. Supp. 880, 62 Misc. Rep. 364; Greenwald v. Weir, 111 N. Y. Supp. 235, 59 Misc. Rep. 431; Schutte v. Weir, 111 N. Y. Supp. 240, 59 Misc. Rep. 438.

Ohio.—Cohn-Goodman Co. v. Wells, Fargo Express Co., 32 Ohio Cir. Ct. R. 190, when a shipper accepts a receipt from an express company for goods delivered to the carrier which contains a condition limiting the liability of the company to \$50 unless another value is stated and fails to fix any value to the goods, he is thereby precluded from recovering more than \$50 for the loss of the goods, where the charges for the carrying are determined by the value of the goods, and the Interstate Commerce Act does not change this rule.

under the Carmack Amendment, of a stipulation, limiting the carrier's liability to an agreed value, where it plainly appears that the rate charged was based on value. A carrier could, at common law, by a fair agreement, limit the recovery in case of loss to an agreed value made to obtain the lower of two or more rates.⁸³ The purpose of the Interstate Commerce Act June 29, 1906, § 7, providing that a carrier on receiving an interstate shipment shall issue a bill of lading therefor and be liable to the holder for any loss, and no contract shall exempt the carrier from the liability imposed, is to render the initial carrier of interstate shipments over connecting lines liable to the holder of the bill of lading for any loss to the property, whether occurring on its line or not, and to prevent interstate carriers from exempting themselves from liability for the loss of property after it has passed into the hands of another carrier for transportation, but it does not abrogate the right of the carriers to regulate their charges for carriage by the value of the goods, or to agree with the shipper on valuation of the property carried, and a contract limiting the carrier's liability to a specified sum in consideration of the rate charged, regulated by the value of the goods, is not invalid.⁸⁴ To regulate its charges

Okl.—*St. Louis & S. F. R. Co. v. Bilby*, 35 Okl. 589, 130 Pac. 1089, a carrier's common-law liability for the safe carriage in interstate commerce may be limited by a special contract supported by a consideration, if reasonably and fairly entered into by the shipper, and not covering losses caused by the carrier's negligence or misconduct; *Missouri, etc., Ry. Co. v. Walston*, — Okl. —, 133 Pac. 42, where there is no agreed valuation and the bill of lading accepted and signed by the shipper without fraud on the carrier's part contains a released valuation, and where subsequently the shipper pays the freight

based on the released valuation, no recovery can be had for loss beyond that authorized by the published rates.

Utah.—*Larsen v. Oregon Short Line R. Co.*, 38 Utah, 130, 110 Pac. 983.

W. Va.—*Fielder & Turley v. Adams Express Co.*, 69 W. Va. 138, 71 S. E. 99.

83. U. S.—*Adams Express Co. v. Croninger*, *supra*; *Chicago, etc., Ry. Co. v. Latta*, *supra*; *Missouri Pac. Ry. Co. v. Harper Bros.*, 201 Fed. 671; *United Lead Co. v. Lehigh Valley R. Co.*, 141 N. Y. Supp. 310.

84. Greenwald v. Barrett, 199 N. Y. 170, 92 N. E. 218, *aff'g order*,

to its customers with reference to the value of the property transported, a carrier may demand of the shipper a declaration of the value, or may agree with him that in default thereof the value shall be deemed a given amount, and the agreement may be direct or it may arise indirectly out of the acceptance by the shipper of a receipt by the carrier stating that the value is to be considered a sum specified, if no other has been given.⁸⁵ A bill of lading whereby a shipper, choosing the lower of the defendant's published rates, declared that in case of loss it would not assert claims against the defendant on a higher valuation than \$100 per ton, was lawful, and conclusive upon the rights of the parties, and for a loss only of a part of the shipment though less than a carload, the defendant was liable only at the rate of \$100 per ton.⁸⁶ In an action against an express company for damages for nondelivery, the shipper, upon whose valuation of the goods the contract was

Greenwald v. Weir, 15 N. Y. Supp. 311, 130 App. Div. 696.

A contract of carriage by a carrier imposes on it the double obligation of carriage proper and of insurance, and it is reasonable and customary to fix a rate to be paid with reference to both liabilities, and to fix such rate it is necessary that the carrier should be apprised of the value of the articles to be carried. Judgment 111 N. Y. S. 235, 59 Misc. Rep. 431, reversed; *Greenwald v. Weir*, 115 N. Y. S. 311, 130 A. D. 696, application denied to resettle order, 116 N. Y. Supp. 172, 131 App. Div. 568.

Where the written receipt constituting the contract of shipment contains a clause by which the shipper agrees that the value of the property is not more than a stated sum unless a different value is stated, and no greater value is stated, the shipper is

estopped from claiming in case of loss that the value was greater. *Id.*

In the absence of statute, a carrier and a shipper may agree, as one of the terms of the contract of shipment, on the value of the goods; and in case of loss thereafter the shipper is estopped from claiming that the goods were of greater value than the sum agreed on. *Id.*

85. *Greenwald v. Barrett*, *supra*.

86. *United Lead Co. v. Lehigh Valley R. Co.*, 141 N. Y. Supp. 310.

Under a shipping receipt for three articles, limiting the liability to \$50, and in case of partial loss to not more than such proportion as \$50 bears to the actual value, if greater, the shipper could recover for one lost article only such proportion of \$50 as the value of the lost article bore to the whole shipment. *Greenfield v. Wells, Fargo & Co.*, 134 N. Y. Supp. 913.

based, could not recover a greater amount.⁸⁷ There has been some confusion upon this question in the decisions of the New York courts, arising out of apparently conflicting decisions of the Court of Appeals. In the case of *Westcott v. Fargo*,⁸⁸ it was held, Dwight, C., writing for the Commission of Appeals, and all concurring, that the result of previous cases decided by the Court of Appeals, including *Magnin v. Dinsmore*,⁸⁹ where it was held that although a common carrier may stipulate for his exemption from liability for losses through his negligence, his contract will not be construed to contain such an exemption unless it is so expressly agreed, was, that it is lawful for a carrier to make such a contract, and that he might, by clear and distinct expressions, relieve himself from losses occasioned by his own negligence. The decision in *Magnin v. Dinsmore*, *supra*, was handed down in March, 1874. The case of *Westcott v. Fargo*, *supra*, was decided by the Commission of Appeals in January, 1875. In the following May the *Magnin* case came before the Court of Appeals on a second appeal,⁹⁰ where it was held *per totam curiam*, Folger, J., assigning the reasons for the judgment, that a stipulation limiting the amount for which the carrier shall be liable was binding upon the shipper who had notice of the limitation and whose merchandise had been lost by the ordinary negligence of the carrier; that silence on the part of the shipper as to the real value, although there is no inquiry by the carrier, and no artifice to conceal the value or to deceive, discharges the carrier from liability for ordinary negligence to a larger amount. When the *Magnin* case came before the Court of Appeals a third time⁹¹ the rule laid down on the second appeal was distinctly reiterated, Allen, J., assigning the reasons, and it has been followed by the Court of Appeals

87. *Pastore v. American Express Co.*, 138 N. Y. Supp. 316.

88. *Westcott v. Fargo*, 61 N. Y. 542, 19 Am. Rep. 300.

89. *Magnin v. Dinsmore*, 56 N. Y. 168.

90. *Magnin v. Dinsmore*, 62 N. Y. 35.

91. *Magnin v. Dinsmore*, 70 N. Y. 410, 26 Am. Rep. 608.

in several subsequent cases.⁹² These two cases, comprising four decisions of our highest court, have been differently interpreted and applied by the legal profession, and, as a recent authority well expresses it, "have been cited on both sides of the bar fittingly and frequently" for many years. Finally, to make confusion still more confounded, in 1901, the Appellate Division of the Second Department, by a unanimous decision, *Woodward, J.*, assigning the reasons, recognizing that there was "some confusion" on this point, attempted to explain the causes of it and to straighten out the situation and, adopting the *Westcott v. Fargo* decision as the true rule, held that where a bill of lading limited the liability of a carrier of goods, its liability as bailee for hire remained unimpaired, so that, though it was not liable as carrier beyond the amount named in the contract, it was liable as bailee for the full value of the goods when negligently injured.⁹³ This decision was affirmed by the majority of the Court of Appeals, on the opinion of the lower court.⁹⁴ Justice O'Brien, however, wrote a dissenting opinion, with which Justice Gray concurred, stating the true rule to be that stated in a preceding paragraph of this section and which is now regarded to be the finally settled rule in this State,⁹⁴ and is sustained by the Federal Supreme Court⁹⁵ and by the Supreme Court of Massachusetts.⁹⁶ The Court of Appeals, in 1906, in the case of *Tewes v. North German Lloyd S. S. Co.*,⁹⁷ *Werner, J.*, writing the prevailing opinion, held that the case of *Westcott v. Fargo* was "distinctly overruled" by that court in the decision in the *Mangin* case on the second appeal, and that the

92. *Zimmer v. New York Cent., etc., R. Co.*, 137 N. Y. 460; *Wheeler v. Oceanic Steam Nav. Co.*, 72 Hun, 5, 25 N. Y. Supp. 578, aff'd 149 N. Y. 576.

93. *Bermel v. New York, etc., R. Co.*, 62 App. Div. 389, 70 N. Y. Supp. 804.

94. *Bermel v. New York, etc., R. Co.*, 172 N. Y. 639, 65 N. E. 1113.

See Par. 9 of this section and cases cited in note 73.

95. *Hart v. Pennsylvania R. Co.*, 112 U. S. 331, 5 Sup. Ct. 151, 28 L. Ed. 717.

96. *Graves v. Lake Shore, etc., R. Co.*, 137 Mass. 33.

97. *Tewes v. North German Lloyd S. S. Co.*, 186 N. Y. 151, 78 N. E. 864, 8 L. R. A. (N. S.) 199.

true rule in that a stipulation limiting the amount of the carrier's liability in case of loss or injury, unless a declaration of value in excess of that sum is made, covers a loss of goods occasioned by negligence, although there is no express provision exempting the carrier from liability for its own negligence. A recent case in the Appellate Division of the First Department, decided in 1909, based upon the last decision of the Court of Appeals, holds that an agreement that a carrier of an express package, the value of which is not stated, shall not be liable in any sum above fifty dollars, is good, whether the carrier is careless or not.⁹⁸ In California, it is the rule that a shipping contract voluntarily entered into, which fixes an agreed valuation of the property which forms the basis for the freight charges, is an agreement fixing the valuation of the property, and not a contract limiting the liability of the carrier, and under the contract the carrier is only liable as stipulated, and then only to the extent of the valuation fixed.⁹⁹ In Colorado, a carrier may limit its liability in the transportation of freight, where proper methods of valuation are pursued; but a contract limiting a carrier's liability to five dollars per hundred weight, or to a maximum of \$120, was held to be invalid, where the freight is worth over \$900, and the carrier had knowledge thereof.¹ In Indiana, it is held that there is no difference between a shipment

98. *Magnus v. Platt*, 115 N. Y. Supp. 824, 62 Misc. Rep. 499.

99. *Mering v. Southern Pac. Co.*, 161 Cal. 297, 119 Pac. 80.

Under Civ. Code, § 2174, permitting the obligations of a common carrier to be limited by special contract as well as under the general rules of law, a contract with an express company, limiting the recovery to the value agreed upon between it and the shipper in consideration of a special rate given, is valid. *Reeder v. Wells, Fargo & Co.* 14 Cal. App. 790, 113 P. 342.

A shipper who stipulates when the shipment is received that the goods are of a certain value, is estopped from claiming a greater amount in an action for damages for their loss or injury. *Id.*

1. *Colorado & S. Ry. Co. v. Manatt*, 21 Colo. App. 593, 121 Pac. 1012.

An attempt to limit a carrier's liability to an arbitrary amount, without regard to the value of the shipment, is void, although assented to in writing by the shipper. *Union Pac. R. Co. v. Stupeck*, 50 Colo. 151, 114 P. 646.

at an agreed valuation and a shipment without an agreed valuation, but under an agreement limiting the amount of the carrier's liability to an agreed amount in consideration of reducing the rate, both standing on the same basis with reference to their validity.² Parties may agree on the valuation of property shipped by express, and limit the carrier's liability by a contract fairly made, on a good consideration.³ An agreement of shipment, limiting the liability of an express company for the freight shipped to a certain sum, is held, in Iowa, to be void at common law as against public policy, as well as by Code, § 2074, providing that no contract shall exempt a railway corporation from the liability of a common carrier which would exist had no contract been made; and such rule is not obviated by the provisions of the Interstate Commerce Act, making a common carrier liable to the holder of the bill of lading for any damage, etc., caused by it or by any subsequent carrier, and providing that no contract shall exempt such carrier from the liability thereby imposed.⁴ The contract of a carrier to relieve itself of its common-law liability by arbitrarily fixing the value of property carried to determine the freight and the extent of its liability, is in violation of the express provision of Kentucky Const., § 196, and void, except in cases of fraud.⁵ In an action for damages to goods shipped under a bill of lading providing that any loss or damage shall be computed at the value of the property at the time and place of shipment, the provision controls in Maryland.⁶ A common carrier, by agreement with a shipper, can limit its liability for damages for goods injured to the amount stipulated in the shipping receipt, under New Jersey law, such contract not being opposed to public policy.⁷ Under the laws of

2. *Wabash R. Co. v. Priddy*, —Ind. —, 101 N. E. 724.

3. *Adams Express Co. v. Byers*, —Ind. —, 95 N. E. 518.

4. *Winn v. American Express Co.*, 149 Iowa, 259, 128 N. W. 663.

5. *Louisville & N. R. Co. v. Woodford*, 152 Ky. 398, 153 S. W. 722;

Southern Express Co. v. Fox & Logan 131 Ky. 257, 115 S. W. 184, 117 S. W. 270.

6. *Merchants' & Miners' Transp. Co. v. Eichberg*, 109 Md. 211, 71 Atl. 993; *Eichberg v. Central of Ga. Ry. Co.*, Id.

7. *American Silk Dyeing Co. v.*

Kansas, railroads as carriers are liable at common law to pay a shipper in full for property lost or damaged to the extent of injuries sustained and the contract limiting such liability is void unless made by the permission of the State Board of Railroad Commissioners.⁸ In North Dakota it is held that a special contract limiting the liability of a carrier will not be enforced unless fairly entered into, and stipulations fixing a mere arbitrary valuation for the purpose of limiting the carrier's liability are not just and reasonable.⁹ It has been held in Texas that a contract for shipment of freight, which limits the recovery to a specified sum per hundred pounds, is invalid at common law.¹⁰ A stipulation in a bill of lading, limiting the carrier's liability to the value of oil shipped at the point of shipment, is contrary to public policy and void.¹¹ In Washington it is the rule that a limitation on the value of the goods shipped in consideration of a reduced rate of carriage is binding in the event of loss, and the shipper cannot recover above the value fixed, where the contract is fairly made.¹² A bill of lading, providing that the carrier shall not be liable beyond the value fixed, relates to loss of goods, and does not preclude recovery for delay or fix amount of such damages in West Virginia.¹³ A contract limiting the liability of a carrier to a certain amount in case of loss of or injury to the goods in consideration of a reduced rate does not limit the recovery in case of delivery to the wrong person.¹⁴ The Federal courts have held that, where a carrier's transportation contract provided that it should

Fuller's Express Co., 82 N. J. Law, 654, 82 Atl. 894; Saunders v. Adams Express Co., 76 N. J. Law, 228, 69 Atl. 206; Atkiknson v. New York Transfer Co., 76 N. J. Law, 608, 71 Atl. 278.

8. Atchison, etc., Ry. Co. v. Rodgers, 16 N. M., 120, 113 Pac. 805.

9. Hanson v. Great Northern Ry. Co., 18 N. D. 324, 121 N. W. 78.

10. Atchison, etc., Ry. Co. v. Smythe, (Tex. Civ. App.) 119 S. W. 892.

11. Baltimore & O. R. Co. v. Oriental Oil Co. (Tex. Civ. App.) 111 S. W. 979.

12. Windmiller v. Northern Pac. Ry. Co., 52 Wash. 613, 101 Pac. 225.

13. Delaney v. United States Express Co., 70 W. Va. 502, 74 S. E. 512.

14. Clarke-Lawrence Co. v. Chesapeake & O. R. Co., 63 W. A. 423, 61 S. E. 364.

not be liable for more than \$1,200 for the contents of plaintiff's car, it was liable for such proportion of that amount as the value of the property destroyed bore to the value of all the property in the car.¹⁵

§ 31. Limitation of amount where value is not disclosed.

A receipt given by an express company for the transportation of goods providing that the value was not more than fifty dollars unless a greater value was stated therein, and that the company should not be liable for more than the value so stated, nor for more than fifty dollars if no value was stated therein, limited its liability to fifty dollars, in the absence of a declaration of a greater value of the goods.¹⁶ Where the consignor of goods by express fails to place a value on the shipments, as called on to do by the bill of lading filled out by him, the alternative provision thereof limiting the value to fifty dollars will prevent any further recovery.¹⁷ Where an express company received a package without notice as to its value, and gave a receipt limiting its liability, and received the minimum rate of transportation, in the event of a loss, the company is liable only for the amount specified.¹⁸ Under Virginia Code 1904, § 1294c(24), providing that no contract shall exempt any common carrier from the liability of a common carrier which would exist had no contract been made or entered into, an express company is liable for the full value of a trunk destroyed

15. *Shelton v. Canadian Northern Ry. Co.*, (C. C., Minn.) 189 Fed. 153.

Such a contract has no application to a cause of action for the carrier's conversion of property in the car not destroyed, and for which plaintiff was entitled to recover the value of the property at the time it was converted. *Id.*

A clause in a bill of lading that the value of goods lost or injured shall be computed at the place and time of shipment is reasonable and

valid. *Inman & Co. v. Seaboard Air Line Ry. Co.*, (C. C., Ga.) 159 Fed. 960.

16. *Cohen v. Morris European & American Express Co.*, 136 N. Y. Supp. 489, 151 App. Div. 672, rev'g judg. 132 N. Y. Supp. 347.

17. *D'Arcy v. Adams Express Co.*, 162 Mich. 363, 17 Detroit Leg. N. 593. 127 N. W. 261.

18. *Southern Express Co. v. Stevenson*, — Miss. —, 42 So. 670.

by fire without negligence on its part, without regard to a stipulation in its receipt that, no value being given, it would be liable for only fifty dollars.¹⁹ Plaintiff shipped a package of furs, worth \$2,000 by defendant express company. Plaintiff marked no value on the package and gave none in her communications to the express company; but the box had been previously used, and a \$150 valuation was marked thereon, and this amount was stated by the express company in the receipt as the value of the package. Plaintiff accepted the receipt without demur, and after the loss of the package made no claim of mistake in valuation, but claimed the right to recover the full value of the furs in spite of the limitation of liability contained in the receipt. It was held that plaintiff's recovery was limited to \$150.²⁰ A limitation of an express carrier's liability to fifty dollars, contained in a contract for carriage, controls, where no other value is given.²¹

§ 32. Limitation of amount where loss is caused by negligence or wrongful act of carrier.

A clause in a bill of lading, providing that liability was released to "\$5.00 per hundred" by reason of low rate and that shipper had option to pay higher rate without limitation, accepted by a shipper of household goods, is not effective to limit the liability of a carrier as to damage arising from its own negligence.²² Where

19. *Southern Express Co. v. Keeler*, 109 Va. 459, 64 S. E. 38

20. *Taylor v. Weir*, (C. C., Pa.) 162 Fed. 585; *Bates v. Weir*, 105 N. Y. Supp. 785, 121 App. Div. 275.

21. *Goodfield v. Platt*, 130 N. Y. Supp. 180.

22. *Boyle v. Bush Terminal R. Co.*, 151 App. Div. (N. Y.) 551, 136 N. Y. Supp. 355.

In this case the Court followed and held as authority as to its own and similar facts the case of *Bermel v. New York, etc., R. Co.*, 62 App. Div.

389, 70 N. Y. Supp. 804, *aff'd* on opinion below 172 N. Y. 639, 65 N. E. 1113, which held that a contract between a carrier and a shipper which attempted to limit the liability of the carrier could not exempt or limit the liability of the carrier for its own negligence, unless the contract plainly and unequivocally made reference to the negligence of the shipper as one of the causes of damage as to which there was a limitation of liability, and disregarded the later cases of

express receipts stated that the express company should not be liable for any loss caused by the wrongful or negligent action of the company's agents in any amount exceeding fifty dollars, unless the true value was stated in writing and an additional amount paid under special agreement at the company's office, loss of goods by the negligence of the carrier's agents would not make the company liable for more than the stipulated amount, in the absence of an agreement contemplated by the receipt.²³ It is held in Alabama that it is violative of public policy for a carrier, as a paid bailee, to limit the extent of its liability for the negligence of itself or its agents or servants by an agreed valuation upon consideration of reduced charges for the carriage of goods, when such agreed valuation is disproportionate to the real value of the goods, though the contents of the package or its real value be not disclosed to the carrier.²⁴ Under the California Civil Code, § 2175, providing that a carrier cannot be exonerated by any agreement from liability for gross negligence, a contract which attempts to fix a liability

Tewes v. North German Lloyd S. S. Co., 186 N. Y. 151, 78 N. E. 864, 8 L. R. A. (N. S.) 199, 9 Ann. Cas. 909, holding, by a divided court, that a passenger who had delivered baggage to a defendant for transportation could not recover damages beyond the amount stipulated in the passage ticket, even where the cause of the loss was the negligence of the carrier, and no reference had been made in the stipulation as to negligence as a cause of loss, and *Gardiner v. New York Cent., etc., R. Co.*, 201 N. Y. 387, 94 N. E. 876, 34 L. R. A. (N. S.) 826, holding, by a divided court, that a passenger suing for loss of baggage could not recover beyond the amount stipulated in the passage ticket even where the loss occurred through the negligence of the carrier. The Court, in the last mentioned case,

had said that the *Bermel Case* "must be regarded either as decided on the special features of that case or else as limited in its application to a case like the present one by our decision in the *Tewes Case*."

See also Sec. 30, *supra*.

23. *Rappaport v. White's Express Co.*, 131 N. Y. Supp. 131, 146 App. Div. 576.

24. *Southern Express Co. v. Gibbs*, 155 Ala. 303, 46 So. 465.

The *Commodity Act* (Gen. Acts 1907, p. 209), and *Gen. Acts Sp. Sess.* 1907, p. 125, fixing rates to be charged by railroads, did not operate to validate provisions of bills of lading exempting carriers from liability for loss of goods, except as to the amount stipulated in such bills. *Alabama Great Southern R. Co. v. McCleskey*, 160 Ala. 630, 49 So. 433.

for half the actual value of the property carried, or any other proportion less than the actual value, is void.²⁵ An action of trover will lie by a shipper against a carrier for conversion of the goods shipped, and recovery may be had for the full value of the goods, where the goods were embezzled by an employe of the carrier, although the shipping receipt limits the liability of the carrier to a specified sum, which is less than such value. Such a limitation applies only in case of loss of the goods by negligence.²⁶ Public policy forbids a common carrier, by a mere arbitrary preadjustment of damages, from fixing the measure of its liability in case of loss or damage to goods shipped, though an agreement in good faith that the goods are of a given value is valid.²⁷ Where no value is placed on goods shipped by an express company, and no effort is made to arrive at a valuation, the fact that a receipt is signed reciting that the shipper agrees that the value is not more than fifty dollars, unless a greater value is stated in the receipt, will not relieve the carrier, in case of loss resulting from negligence, from liability for the actual value of the goods.²⁸ A contract of shipment made with an express company by a consignor in another State limiting the express company's liability to the consignees to

25. *Donlon Bros. v. Southern Pac. Co.*, 151 Cal. 763, 91 Pac. 603, 11 L. R. A. (N. S.) 811, the contract establishing the value will be construed to embrace the real value.

26. *Adams Express Co. v. Berry & Whitmore Co.*, 35 App. D. C. 208.

27. *Louisville & N. R. Co. v. Tharpe*, 11 Ga. App. 465, 75 S. E. 677; *Central of Ga. Ry. Co. v. Butler Marble & Granite Co.*, 8 Ga. App. 1, 68 S. E. 775, an arbitrary fixing of value may be treated as a mere attempt in advance to limit liability.

28. *Adams Express Co. v. Chamberlin-Johnson-DuBose Co.*, 138 Ga. 455, 75 S. E. 601; *Southern Express Co. v. Hanaw*, 134 Ga. 445, 67 S. E.

944, the statement being not a valuation, but an arbitrary limitation upon the carrier's liability.

Shippers of stone damaged in transit were not limited in their recovery to an amount stated in the bills of lading, if such damage resulted from the carrier's negligence. *Louisville & N. R. Co. v. Venable*, 132 Ga. 501, 64 S. E. 466.

Such a stipulation as to the value of the goods is not binding on the owner unless expressly agreed to by him, and on loss of the goods he can recover full damage. *Southern Express Co. v. Briggs*, 1 Ga. App. 294, 57 S. E. 1066.

a sum less than the actual value of the goods is contrary to public policy, and not enforceable in the State of Illinois.²⁹ In Minnesota, where a shipper and carrier fairly and honestly agree as to the value of the property to be shipped, as the basis of the carrier's charges and responsibility, and not for the purpose of limiting the amount for which the carrier shall be liable for losses resulting from its negligence, such agreement is valid, and the values so agreed upon will be the limit of recovery.³⁰ A carrier

29. *Nonotuck Silk Co. v. Adams Express Co.*, 256 Ill. 66, 99 N. E. 895, aff'g judg. 166 Ill. App. 519; *Id.*, 256 Ill. 76, 99 N. E. 897, aff'g judg. 166 Ill. App. 525.

A consignee who has not participated in the fraud in connection with obtaining a low rate, and who has not assented to the terms of limitation, is not barred when he sues for loss resulting from negligence of the carrier. *Id.*

Under the laws of New York, in the absence of fraud, misrepresentation, or concealment, the acceptance of such express receipt containing limitations upon the amount of the recovery, unless the true value of the merchandise shipped is stated in the receipt, is valid and enforceable as a contract. *Ginsburg v. Adams Express Co.*, 160 Ill. App. 566.

Hurd's Rev. St. 1905, c. 27, providing that when property is received by a carrier to be transported it shall not be lawful for the carrier to limit its common-law liability by any stipulation or limitation expressed in the receipt given for the property, renders such a provision in an express receipt invalid as a limitation of the carrier's common-law liability. *Cutter v. Wells, Fargo & Co.*, 237 Ill.

247, 86 N. E. 695, aff'g judg. *Wells, Fargo & Co. v. Cutter*, 140 Ill. App. 324.

30. *Cole v. Minneapolis, etc., Ry. Co.*, 117 Minn. 33, 134 N. W. 296; *O'Connor v. Great Northern Ry. Co.*, 120 Minn. 359, 139 N. W. 618.

Where there is no affirmative showing that the exemption is just and reasonable the clause is void. *Murphy v. Wells, Fargo & Co.*, 99 Minn. 230.

A contract between a common carrier and the shipper, limiting the carrier's liability in case of loss to a stipulated valuation, will be upheld, if fairly entered into by the shipper, and also just and reasonable. *Ostroot v. Northern Pac. R. Co.*, 111 Minn. 504, 127 N. W. 177.

A carrier cannot, by placing an arbitrary value upon property in his possession for carriage, limit his liability for loss through negligence. *Porteous v. Adams Express Co.*, 112 Minn. 31, 127 N. W. 429.

In New York, where a carrier limits his liability where the value of goods shipped is not stated, if goods of greater value are so delivered, silence of the shipper as to the real value is held a legal fraud, which discharges the carrier from liability for

of goods can limit its liability for negligence, under the law of Missouri, when the shipper fixes a valuation upon the goods, and agrees that the carrier's liability shall not exceed such value, where a higher rate is charged on goods of greater value.³¹ A clause in a bill of lading fixing the value of the goods shipped will not relieve the carrier from liability for the full value of the goods, in North Carolina, if they are destroyed or injured by its negligence.³² While, in South Carolina, a carrier cannot by contract exempt itself from liability for negligence, it and the shipper may make a special contract upon consideration agreeing on a valuation of property shipped in case of damage; and a shipper who by special contract agrees on a value of the goods in case of loss, and in consideration thereof obtains a reduced rate, is estopped from showing that the real value of the goods was greater than

ordinary negligence in an amount in excess of the limitation of the contract. *Porteous v. Adams Exp. Co.*, 115 Minn. 281, 132 N. W. 296.

31. *Townsend & Wyatt Dry Goods Co. v. United States Express Co.*, 133 Mo. App. 683, 113 S. W. 1161; also holding that, under the law of New York, where the shipper of goods states no value, the carrier is liable for the actual value of goods negligently lost, but one who undervalues to obtain a lower rate risks the difference between the real value of the goods and the lesser value assumed in the carrier's receipt. *Mires v. St. Louis & S. F. R. Co.* 134 Mo. App. 379, 114 S. W. 1052.

A stipulation in a bill of lading that the damage shall be computed at the value of the goods at the place and time of shipment is valid when fairly made, even though the loss occurs by the carrier's negligence and the stipulation is not supported by a reduced rate of freight or other spe-

cial consideration. *Gratiot Street Warehouse Co. v. Missouri, etc., Ry. Co.*, 124 Mo. App. 545, 102 S. W. 11. But such a provision does not cover the owner's damages from delay in transportation. *Morrow v. Missouri Pac. Ry. Co.*, 140 Mo. App. 200, 123 S. W. 1034.

32. *J. M. Pace Mule Co. v. Seaboard Air Line Ry. Co.*, 160 N. C. 215, 76 S. E. 513; *Herring v. Atlantic Coast Line R. Co.*, 160 N. C. 252, 76 S. E. 527; *Stringfield v. Southern Ry. Co.*, 152 N. C. 125, 67 S. E. 333.

Damages to property injured in transit are estimated upon the net value of the property at the place of delivery, notwithstanding a stipulation in the bill of lading that the measure of damages should be the value at the point of shipment, since such stipulation is void, as limiting liability for negligence. *McConnell Bros. v. Southern Ry. Co.*, 144 N. C. 87, 56 S. E. 559.

that contracted.³³ In Texas a provision in a bill of lading that the carrier should not be held liable beyond fifty dollars, "unless the true value is stated therein, and an extra charge paid, based upon such higher value," is not void as an attempt to arbitrarily limit liability for loss from negligence without regard to real value, and the consignee is bound thereby, in an action against the carrier for injury to goods.³⁴ But a carrier having an opportunity to see and know the nature and value of freight to be carried cannot by contract relieve itself from liability for full value for loss through its negligence.³⁵ Under Virginia Code 1904, § 1294c, subsec. 24, declaring that any carrier issuing its receipt shall be liable for loss or damage from its own negligence or the negligence of any connecting carrier, and that no receipt shall exempt it from the liability of a common carrier, the provision of an express company's receipt limiting its liability to a certain sum unless a

33. *Black v. Atlantic Coast Line R. Co.*, 82 S. C. 478, 64 S. E. 418; *Faulk v. Columbia, etc., R. Co.*, 82 S. C. 369, 64 S. E. 383.

Where one delivered to an express company for transportation property worth \$700, and declared a valuation of \$400, to which amount the carrier's liability was thereby limited, its liability in case of a loss of a part of the property not exceeding \$400 in value is the whole value of the part lost, and not merely four-sevenths thereof. *Visanaka v. Southern Express Co.*, 92 S. C. 573, 75 S. E. 932. See also *De Schamps v. Atlantic Coast Line R. Co.*, 84 S. C. 358, 66 S. E. 414; *Matheson v. Southern Ry. Co.*, 79 S. C. 155, 60 S. E. 437; *Huguelet v. Warfield*, 84 S. C. 87, 65 S. E. 985. as to measure of consignee's damages.

34. *Pacific Express Co. v. Ross*, (Tex. Civ. App.) 154 S. W. 340.

Where a carrier receiving a pack-

age for transportation, under a contract stipulating that in no event should it be liable beyond \$50 at which sum the property was valued, failed to deliver the package, it breached its contract and became liable for the full value thereof as against the defense that payment of the full value which exceeded \$50 would make it liable to prosecution for violation of the law requiring equal charges, because the charges were based on a \$50 valuation. *Wells, Fargo & Co. v. Neiman-Marcus Co.*, (Tex. Civ. App.) 125 S. W. 614.

A stipulation in a receipt by an express company acknowledging the receipt of a package for transportation for delivery that in no event should it be liable in excess of \$50 at which sum the property was valued, etc., is void. *Id.*

35. *Galveston, etc., Ry. Co. v. Crip-pen*, (Tex. Civ. App.) 147 S. W. 361.

greater value was declared by the shipper, would furnish no defense to the shipper's action to recover the value of goods lost or injured.³⁶

§ 33. Stipulation that measure of damages shall be invoice value or market value at place of shipment.

A stipulation or clause in a bill of lading that, in case of loss, damage or non-delivery, the carrier shall not be liable for more than the invoice value of the goods, or that the value of the goods shall be estimated at the place of shipment, instead of at the place of destination, is valid, when freely and fairly entered into, whether the loss be the result of the carrier's negligence or not.³⁷ The courts of Texas, however, hold that any contract by which a carrier receiving freight for shipment relieves itself from liability for the full value for loss through its own negligence is invalid, and regard such a stipulation as an attempt, on the part of the carrier, to limit its liability for the consequences of its own negligence, and for that reason unlawful, where it is shown that the loss was the result of the carrier's negligence.³⁸ In Minnesota it

36. *Adams Express Co. v. Green*, 112 Va. 527, 72 S. E. 102.

37. *Phoenix Ins. Co. v. Erie, etc., Transp. Co.*, 117 U. S. 314; *The Aline*, 25 Fed. 562; *The Lydia Monarch*, 23 Fed. 298; *Rosenfeld v. Peoria, etc., R. Co. (Ind.)*, 2 N. E. 344; *South, etc., Alabama R. Co. v. Henlein*, 52 Ala. 606, 23 Am. Rep. 578, 56 Ala. 368, 19 Am. Ry. Rep. 200; *Brown v. Cunard S. S. Co.*, 16 N. E. 717; *Rogan v. Wabash R. Co.*, 51 Mo. App. 665; *Louisville, etc., R. Co. v. Oden*, 80 Ala. 38; *Chicago, etc., R. Co. v. Harmon*, 17 Ill. App. 640; *Caples v. Louisville, etc., R. Co.*, 17 Mo. App. 14.

38. *Houston, etc., R. Co. v. Williams* (Tex. Civ. App.), 31 S. W. 556;

Houston, etc., R. Co. v. Davis (Tex. Civ. App.), 31 S. W. 308; *Galveston, etc., R. Co. v. Ball*, 80 Tex. 603; *Fort Worth, etc., R. Co. v. Great-house*, 82 Tex. 104, 49 Am. & Eng. R. Cas. 157; *Missouri Pac. R. Co. v. Fagan*, 72 Tex. 127, 13 Am. St. Rep. 776, 35 Am. & Eng. R. Cas. 666; *Gulf, etc., R. Co. v. Key*, 4 Tex. App. Civ. Cas., § 257; *Southern Pac. R. Co. v. Maddox*, 75 Tex. 300, 42 Am. & Eng. R. Cas. 528; *Taylor, etc., R. Co. v. Montgomery*, 4 Tex. App. Civ. Cas., § 238; *Taylor, etc., R. Co. v. Sublett* (Tex. App.) 16 S. W. 182; *Missouri Pac. R. Co. v. Edwards*, 78 Tex. 307; *St. Louis, etc., R. Co. v. Robbins*, 4 Tex. App. Civ. Cas., § 43; *International, etc., R. Co. v. Ander-*

is held that a condition in a bill of lading, providing that the amount of loss or damages incurred by the carrier shall be computed upon the value of the property at the place of shipment, and which makes no provision for repayment of the freight charges received by the carrier is unreasonable, against public policy, and void.³⁹ In some jurisdictions the carrier is liable for the actual damages to property injured in transportation, not exceeding the sum named in a stipulation in a contract of shipment limiting its liability and fixing such sum as their value, although the property in its damaged condition sold for more than such sum,⁴⁰ while in others the shipper is only entitled to recover as damages for the injury an amount bearing the same proportion to the actual damages that the stipulated value bears to the actual value.⁴¹ The provision of a bill of lading limiting damages for injury to property during transportation is waived by a settlement of the damages, in which the property is taken and a larger sum agreed to be paid therefor,⁴² and where the carrier has compromised a claim made against it, it cannot afterwards avoid the compromise by claiming that it finds that it was not liable.⁴³

§ 24. Construction of special contracts.

It is generally held by the courts, upon considerations of public policy and the relative position of the parties to such contracts,

son, 3 Tex. Civ. App. 8; Gulf, etc., R. Co. v. Booton, 4 Tex. App. Civ. Cas., § 230; Eells v. St. Louis, etc., R. Co., 52 Fed. 903, 55 Am. & Eng. R. Cas. 339.

Where the loss is not shown to have been caused by the negligence of the carrier such a stipulation is valid and binding. Missouri Pac. R. Co. v. Ryan, 2 Tex. App. Civ. Cas., § 430.

39. Shea v. Minneapolis, etc., R. Co., 63 Minn. 228, 65 N. W. 458.

40. Starnes v. Louisville, etc., R.

Co., 91 Tenn. 516 19 S. W. 675, 55 Am. & Eng. R. Cas. 354; Georgia R., etc., Co. v. Reid, 91 Ga. 377, 17 S. E. 934, 55 Am. Eng. R. Cas. 363.

41. St. Louis, etc., R. Co. v. Lesser, 46 Ark. 236.

42. Chicago, etc., R. Co. v. Katzenbach, 118 Ind. 174, 20 N. E. 709, 38 Am. & Eng. R. Cas. 375; International, etc., R. Co. v. Underwood, 62 Tex. 21, 21 Am. & Eng. R. Cas. 143.

43. Grinnell v. Wisconsin Cent. R. Co., 47 Minn. 569.

that clauses inserted in a contract granting immunity to the carrier from its common law obligations, should be strictly construed against the carrier, whose language they are presumed to be and who is in an advantageous position in fixing the terms of the contract. Without such restrictive clauses the carrier would be liable, and to render them valid, they must be clearly within the meaning and intent of the parties, reasonable in themselves, and not against public policy.⁴⁴ Such clauses must be clear and distinct expressions, free from ambiguity, leaving nothing to implication or inference.⁴⁵ The contract, so far as it purports to exempt the carrier from liability for its negligence, must be construed so as not to include any kind or sort of negligence not specifically and expressly stated in it. However broad or general may be the language of the contract which does not specifically and in express terms release the carrier from the consequences of his own negligence, it will not effect such release, if the general words may operate with-

44. *Bermel v. New York, etc., R. Co.*, 172 N. Y. 639, 65 N. E. 1113, affg. 62 App. Div. (N. Y.) 389, 70 N. Y. Supp. 804; *Westcott v. Fargo*, 61 N. Y. 542, 19 Am. Rep. 300; *Myrard v. Syracuse, etc., R. Co.*, 71 N. Y. 180, 27 Am. Rep. 28; *Edsall v. Camden, etc., R. Co.*, 50 N. Y. 661; *Alexander v. Greene*, 7 Hill N. Y. 633; *Steele v. Townsend*, 37 Ala. 255, 79 Am. Dec. 49; *Louisville, etc., R. Co. v. Meyer*, 78 Ala. 600; *Louisville, etc., R. Co. v. Touart*, 97 Ala. 514, 55 Am. & Eng. R. Cas. 500; *Hooper v. Wells*, 27 Cal. 11, 85 Am. Dec. 211; *Chicago, etc., R. Co. v. Davis*, 159 Ill. 53; *Atwood v. Reliance Transp. Co.*, 9 Watts (Pa.) 87, 34 Am. Dec. 503; *Deming v. Merchants' Cotton-Press, etc., Co.*, 90 Tenn. 306; *Thomas v. Lancaster Mills*, 71 Fed. 481; *Cream City R. Co. v. Chicago, etc., R. Co.*, 63 Wis.

93, 53 Am. Rep. 267; *Hawkins v. Great Western R. Co.*, 17 Mich. 57, 97 Am. Dec. 179; *Kansas City, etc., R. Co. v. Holland*, 68 Miss. 351; *Menzell v. Chicago, etc., R. Co.*, 1 Dill (U. S.) 531; *Coupland v. Housatonic R. Co.*, 61 Conn. 531.

45. *Westcott v. Fargo, supra*; *Bermel v. New York, etc., R. Co., supra*; *New Jersey Steam Nav. Co. v. Merchants' Bank*, 6 How. (U. S.) 344.

A clause in a bill of lading providing that merchandise on wharf, awaiting shipment or delivery, shall be at shipper's risk of loss or damage by fire or flood, must be given the meaning the language plainly expresses, and is applicable where the goods were burned after being placed on the wharf, but before shipment. *Washburne-Crosby Co. v. William Johnson & Co.*, 125 Fed. 273, 60 C. C. A. 187.

out including such negligence.⁴⁶ Some of the rulings of the courts as to exemptions from particular risks or causes of loss are stated in the note below.⁴⁷ Generally, the courts will not construe a

46. *Kenny v. New York Cent., etc., R. Co.*, 125 N. Y. 422, 26 N. E. 626; *Holsapple v. Rome, etc., R. Co.*, 86 N. Y. 278; *Nicholas v. New York Cent. R. Co.*, 89 N. Y. 370; *Mynard v. Syracuse, etc., R. Co.*, 71 N. Y. 180, 27 Am. Rep. 28; *Zimmer v. New York Cent., etc., R. Co.*, 137 N. Y. 462, affg. 42 St. Rep. (N. Y.) 63, 16 N. Y. Supp. 631; *Hawkins v. Great Western R. Co.*, 17 Mich. 57, 97 Am. Dec. 179; *Central R., etc., Co. v. Anderson*, 59 Ga. 393, 16 Am. Rep. 85.

47. *Theft, barratry, etc.*—Where a quantity of gold coin was shipped on a steamship, under a bill of lading exempting the carrier from liability for loss by “barratry of master or mariners,” and the proof indicated that some of the money was stolen on the passage by the purser, the loss was held to be within the exemption. *Spinetti v. Atlas Steamship Co.*, 80 N. Y. 71, 36 Am. Rep. 579, following the doctrine laid down as to similar clauses in a policy of insurance in *American Ins. Co. v. Bryan*, 1 Hill (N. Y.), 25, 26 Wend. (N. Y.) 563 37 Am. Dec. 278; *Atlantic Ins. Co. v. Storrow*, 5 Paige (N. Y.) 285, and controverting the contrary doctrine of the English cases, *De Rothschild v. Royal Mail Packet Co.*, 7 Exch. 734, 21 L. J. Exch. 273; *Taylor v. Liverpool, etc., Steam Co.*, L. R. 9 Q. B. 546, 22 W. R. 752, 43 L. J. Q. B. 205.

Limiting liability after freight had reached its destination.—Notwithstanding a bill of lading provided

that the railroad company would not be liable as a common carrier after the freight had reached its destination, public policy so modified the contract as to give the consignee a reasonable time within which to remove the goods after arrival before such liability ceased. *Tallassee Falls Mfg. Co. v. Western Ry. of Alabama (Ala.)*, 29 So. 203. See also, *Ayres v. Western R. Corp.*, 14 Blatchf. (U. S.) 9; *The Majestic*, 56 Fed. 244.

Loss of cotton by fire.—A provision of a bill of lading that “cotton is excepted from any clause herein on the subject of fire, and the carrier shall be liable as at common law for loss or damage of cotton by fire,” affects not only such other provisions of the contract as relate to the subject of fire, but the latter clause applies to all other provisions which modify the common-law liability of the carrier, such as that it shall not be liable for loss or damage to the property after it is ready for delivery to another carrier or the consignee, or shall only be liable under certain circumstances as warehouseman; and where the subject of the shipment is cotton, and it is destroyed by fire, the liability of the carrier is in all respects governed by the common law. *Texas, etc., R. Co. v. Calendar*, 98 Fed. 538, 39 C. C. A. 154.

Cases where loss of cotton by fire while in a compress not owned or operated by the carrier have been held within an exemption in the bill of lading are: *Lancaster Mills v.*

contract so as to render it illegal if it will bear another construc-

Merchants' Cotton-press Co., 89 Tenn. 1, 24 Am. Rep. 586, 45 Am. & Eng. R. Cas. 423; *Missouri Pac. R. Co. v. Sherwood*, 84 Tex. 125. *Compare* *Deming v. Merchants' Cotton-press Co.*, 90 Tenn. 306.

Breach of agreement to furnish cars.—A limitation from liability contained in a drover's pass does not constitute a defense to a breach, prior to its delivery, of an agreement to furnish cars for transportation. *Hastings v. New York, etc., R. Co.*, 53 Hun (N. Y.), 638, 6 N. Y. Supp. 836.

Dangers of fire, collision and navigation.—Such a clause will embrace a loss caused by the vessel's running into a newly formed sand reef, no negligence on the part of the carrier being shown. *Hibernia Ins. Co. v. St. Louis Transp. Co.*, 120 U. S. 166; *Selby v. Wilmington, etc., R. Co.*, 113 N. C. 588. But it is not applicable to a loss by fire after the goods have been unloaded and stored in a warehouse, but only to loss by fire occurring on shipboard. *Black v. Ashley*, 80 Mich. 90, 42 Am. & Eng. R. Cas. 428.

"Unavoidable dangers of river navigation excepted" will cover a loss through collision with another boat, through the negligence of such other boat, and without fault on the part of the contracting carrier. *Hayes v. Kennedy*, 2 Pittsb. (Pa.) 262.

An exception from "dangers of the river" will not cover a loss of goods by robbery, or forcible or illegal seizure without fault or neglect of the carrier. *Boon v. Steamboat Bel-*

fast, 40 Ala. 184, 88 Am. Dec. 161. See also, *Steele v. McTyer*, 31 Ala. 677, 70 Am. Dec. 516.

An exception of losses from "stowage" or from "perils of the sea" will not cover an injury to cattle through the insufficiency of the cattle fittings. *The Brantford City*, 29 Fed. 373. An exemption from losses caused by "any act, neglect or default whatever of master or crew in the navigation of the ship and in the ordinary course of the voyage" will not include such an injury after the ship had reached her destination and while the cargo was being discharged. *The Accomac*, 15 Prob. Div. 208. But see *The Carron Park*, 15 Prob. Div. 203.

Injury received "while at depots."—A clause excepting from "damages incident to railroad transportation, loss or damage by fire, or the elements, while at depots excepted," refers only to depots en route to the place of destination and not to the depot at the end of the route. *E. O. Stannard Milling Co. v. White Line Cent. Transit Co.*, 122 Mo. 258, 61 Am. & Eng. R. Cas. 192.

"Accidents to boilers or machinery" includes the breaking of the axle of a car. *Fairbank v. Cincinnati, etc., R. Co.*, 66 Fed. 471.

Exemption from "damage or loss by reason of breaking, chafing, weather, fire or water" will not include breaking of an animal's leg, caused by its being thrown down by a violent side movement of the car. *Menzell v. Chicago, etc., R. Co.*, 1 Dill. (U. S.) 531.

Exemption from "loss on perish-

tion, as for example, where the carrier is exempted from liability for certain specified causes, the contract will not be construed to relieve it from ordinary negligence on its part,⁴⁸ and where the contract relieves it from negligence, it will not be held to exempt the carrier from liability for wilful acts or misconduct.⁴⁹ The validity of a contract of shipment, fixing the value of the property shipped, depends on the facts connected therewith; and, the issue of its invalidity being tendered by plaintiff, he is entitled to have it determined as an issue of fact.⁵⁰ A provision limiting a carrier's liability, purporting to have been entered into as a basis for his charges, is not conclusive on the question whether it was fairly entered into, but extrinsic evidence is admissible in determining that question.⁵¹ Though contracts limiting the liability of common carriers are strictly construed against the carrier, evidence and findings in cases involving the construction of such contracts are not measured by any different rules than in cases to which carriers are not parties.⁵²

§ 35. When stipulations of contract become inoperative.

Limitations in a contract of shipment upon the liability of the carrier are rendered inoperative and the shipper released therefrom, the carrier becoming subject to its full common law liability as an insurer, where it deviates from the contract by carrying the property by freight, instead of complying with the provision that

able property" will not include mature, merchantable corn. *Illinois Cent. R. Co. v. McClellan*, 54 Ill. 58, 5 Am. Rep. 83.

The words "contents and value unknown," intended to apply to packages the contents of which are concealed, will not cover a shipment of corn in bulk, the character of which is obvious to the carrier. *Tibbits v. Rock Island, etc., R. Co.*, 49 Ill. App. 557.

48. *Welch v. Boston, etc., R. Co.*,

41 Conn. 333, 6 Am. Ry. Rep. 95; *Nicoll v. East Tennessee, etc., R. Co.*, 89 Ga. 260.

49. *Ronan v. Midland R. Co.*, L. R. 14 Ir. 157.

50. *Evansville, etc., R. Co. v. Kevekordes* (Ind. App.), 69 N. E. 1023.

51. *O'Malley v. Great Northern R. Co.*, 86 Minn. 580, 90 N. W. 974.

52. *Adams Express Co. v. Carnahan* (Ind. App.), 63 N. E. 245, 64 N. E. 647.

it shall be carried by passenger train service,⁵³ or in failing to carry the shipper, where by its terms he is entitled to ride free on the train with his stock.⁵⁴

§ 36. Fraudulent concealment or misrepresentation of value by shipper.

A carrier has the right to demand from a consignor such information as will enable it to decide as to the proper compensation to charge for the risk, and the degree of care to bestow in discharging its trust; and a limitation of its liability to a certain amount, unless the value of the goods forwarded is truly stated, if brought to the knowledge of the consignor, is reasonable and consistent with public policy.⁵⁵ Where the consignor ships goods, taking a receipt containing such a stipulation limiting the liability of the carrier, and fails to state the value, and in consequence thereof is charged a less premium than otherwise would have been required, independently of the qualifying words in the receipt, the carrier would be exempt from liability on the ground of want of good faith in not disclosing the value of the goods.⁵⁶ If the shipper use any artifice whatever to conceal from the carrier the true value of the contents of a package delivered to it for transportation, the carrier is relieved from liability for ordinary negligence to a greater extent than the value indicated by the external appearance of the package, or, where there is a contract limiting liability to a specified amount, to a larger amount than

53. Pavitt v. Lehigh Valley R. Co., 153 Pa. St. 302, 32 W. N. C. 65, 25 Atl. 1107.

54. Texas, etc., R. Co. v. Davis, 2 Tex. App. Civ. Cas. § 191.

55. Oppenheimer v. United States Express Co., 69 Ill. 62; Magnin v. Dinsmore, 51 How. Pr. (N. Y.) 457; Baldwin v. Liverpool, etc., Steamship Co., 74 N. Y. 125, 30 Am. Rep. 277; Brown v. Camden, etc., R. Co.,

83 Pa. St. 316; Little v. Boston, etc., R. Co., 66 Me. 239; Norfolk, etc., R. Co. v. Irvine, 85 Va. 217.

56. Oppenheimer v. United States Express Co., *supra*; Graves v. Lake Shore, etc., R. Co., 137 Mass. 33, 16 Am. & Eng. R. Cas. 108, 50 Am. Rep. 282; J. J. Douglass Co. v. Minnesota Transfer R. Co., 62 Minn. 288; M'Cance v. London, etc., R. Co., 7 H. & N. 477.

is specified in the contract,⁵⁷ and is liable only in case of a conversion, or gross, wanton or wilful negligence for the full value.⁵⁸ This qualification is just and reasonable. There is no justice in allowing the shipper to be paid a large value for an article which he has induced the carrier to take at a low rate of freight on the assertion and agreement that its value is a less sum than claimed after loss. Such a concealment of the value of an article destroys all just claim to indemnity, for it goes to deprive the carrier of the compensation it is entitled to, in proportion to the value of the article intrusted to its care and the consequent risk it incurs, and it tends to lessen the vigilance the carrier would otherwise bestow. The shipper has no right, in order to cheapen the freight, which is the usual inducement, to expose the carrier to an increased risk, as must inevitably be the case where the nature and value of the article are studiously concealed. The strict rule of the carrier's liability is for this reason subject to this qualification that the shipper, in such cases, cannot hold the carrier liable for the loss of his goods beyond their apparent value, or the agreed value specified in the contract.⁵⁹ The courts do not state accurately

57. Warner v. Western Transp. Co., 5 Robt. (N. Y.) 490; Orange County Bank v. Brown, 9 Wend. (N. Y.) 116, 24 Am. Dec. 129; Pardee v. Drew, 25 Wend. (N. Y.) 459; Hayes v. Wells, 23 Cal. 185, 83 Am. Dec. 89; Chicago, etc., R. Co. v. Thompson, 19 Ill. 578; St. John v. Southern Express Co., 1 Woods (U. S.), 612; The Ionic, 5 Blatchf. (U. S.) 538; Everett v. Southern Express Co., 46 Ga. 303; Phillips v. Earle, 8 Pick. (Mass.) 182; Earnest v. Southern Express Co., 1 Woods (U. S.), 573; South, etc., Alabama R. Co. v. Henlein, 52 Ala. 606, 23 Am. Rep. 578, 56 Ala. 368; Cooper v. Berry, 21 Ga. 526, 68 Am. Dec. 468; Charleston, etc., R. Co. v. Moore, 80 Ga. 522, 35

Am. & Eng. R. Cas. 623; United States Express Co. v. Koerner (Minn.), 68 N. W. 608; Gibbon v. Paynton, 4 Burr, 2298; Crouch v. London, etc., R. Co., 14 C. B. 255, 78 E. C. L. 255, 18 Jur. 148, 7 Railw. Cas. 717; Edwards v. Sherratt, 1 East 604; Batson v. Donovan, 4 B. & Ald. 21, 6 E. C. L. 373; Belfast, etc., R. Co. v. Keys, 9 H. L. Cas. 556; Bradley v. Waterhouse, M. & M. 154.

58. Rice v. Indianapolis, etc., R. Co., 3 Mo. App. 27; Zouch v. Chesapeake, etc., R. Co., 36 W. Va. 524, 49 Am. & Eng. R. Cas. 712. See other cases cited in notes to this section.

59. Hart v. Pennsylvania R. Co., 112 U. S. 331, 18 Am. & Eng. R. Cas. 604; Relf v. Rapp, 3 W. & S. (Pa.)

what will amount to fraudulent concealment, but it is held that fraud may be as effectually practiced on the carrier by silence as by a positive and express representation, and a neglect or failure to disclose the real value of a package and the nature of its contents, if there be anything in its form, dimensions or outward appearance calculated to deceive and mislead the carrier in fraudulent concealment.⁶⁰ And mere silence on the part of the shipper as to the real value of the goods, although there was no inquiry by the carrier and no artifice used to deceive, has been held to be concealment without design, by failure to observe an implied condition that the contract of carriage is free from misrepresentation or concealment, which will relieve the carrier from a loss caused by ordinary negligence.⁶¹ A carrier carrying goods of much greater value than they were represented to be, and at the rate chargeable for a package of the value represented, cannot recover the additional compensation which would have been charged for the package if its true value had been stated, since its liability cannot exceed the value represented, but is entitled to compensation for the increase of risk of loss, up to that amount, by reason of the greater value of the package.⁶² And where a com-

21, 37 Am. Dec. 528, 9 Am. & Eng. R. Cas. 73; *Coxe v. Heisley*, 19 Pa. St. 243; *Chicago, etc., R. Co. v. Shea*, 66 Ill. 471; *Harvey v. Terre Haute, etc., R. Co.*, 74 Mo. 541, 6 Am. & Eng. R. Cas. 293; *Hyde v. New York, etc., Steamship Co.*, 17 La. Ann. 29; *Elkins v. Boston, etc., R. Co.*, 19 N. H. 337, 51 Am. Dec. 184; *Savannah, etc., R. Co. v. Collins*, 77 Ga. 376, 4 Am. St. Rep. 87; *Galt v. Adams Express Co. McArthur & M. (D. C.)* 124.

A distinction between money as baggage and as freight is made by the courts. A passenger may place a reasonable amount of money in his trunk without communicating the fact to the carrier, but he is guilty

of concealment or fraud in so doing where the trunk is shipped as freight. *Missouri Pac. R. Co. v. York (Tex.)*, 18 Am. & Eng. R. Cas. 623; *Belger v. Dinsmore*, 51 N. Y. 166, 10 Am. Rep. 575; *Dunlap v. International, etc., R. Co.*, 98 Mass. 371.

60. *Shackt v. Illinois Cent. R. Co.*, 94 Tenn. 665, disapproving *Kuter v. Michigan Cent. R. Co.*, 1 Biss. (U. S.) 35; *Rosenfeld v. Peoria, etc., R. Co.*, 103 Ind. 121, 53 Am. Rep. 500, 21 Am. & Eng. R. Cas. 89.

61. *Magnin v. Dinsmore*, 62 N. Y. 35, 20 Am. Rep. 42, 70 N. Y. 410, 26 Am. Rep. 608.

62. *United States Express Co. v. Koerner*, 65 Minn. 540, 33 L. R. A.

mon carrier received a package for transportation, agreeing to carry it for a stipulated sum prepaid, without inquiry into its value, or notice of a limited liability on account of value, and without misrepresentation, deceit or artifice on the part of a shipper, and discovering that the package was of greater value than it supposed, refused to deliver it to the consignee without additional compensation, which the consignee paid, the latter may maintain an action to recover it back.⁶³ But a consignee, though a factor only, is liable for any balance if freight due, according to the statements in the bill of lading, on account of the excess of the real value of the goods over that named in the bill of lading, which was known to him but concealed from the carrier, although on delivery of the goods he paid all the freight which the carrier then supposed to be due.⁶⁴

§ 37. Carrier's duty to inquire as to value of property.

Where a carrier has given no notice limiting its liability or imposing any condition on the shipper of property to disclose its value, it becomes its duty if it desires to be informed of such value to make inquiry, and having accepted the goods for carriage without seeking such information and without qualification, it would be presumptively liable as a common carrier upon common law principles, for a full value. Thus, under a receipt for an article of furniture capable of containing other goods, the carrier is liable for the contents, where there is no fraud.⁶⁵ But if any

600, 4 Am. & Eng. Corp. Cas. N. S. 646, 68 N. W. 181. But see *Rice v. Indianapolis, etc., R. Co.*, 3 Mo. App. 27; *Missouri, etc., R. Co. v. Trinity County Lumber Co.*, 1 Tex. Civ. App. 553, holding that the carrier may recover of the consignee the usual charges.

63. *Baldwin v. Liverpool, etc., Steamship Co.*, 74 N. Y. 125, 30 Am. Rep. 277.

64. *North German Lloyd v. Heule,*

44 Fed. 100, 10 L. R. A. 814. And see *Gates v. Ryan*, 37 Fed. 154; *Neilsen v. Jessup*, 30 Fed. 138; *The Bermuda*, 29 Fed. 399; *Elwell v. Skiddy*, 77 N. Y. 282; *The Denmark*, 27 Fed. 141; *Philadelphia, etc., R. Co. v. Barnard*, 3 Ben. (U. S.) 39; *Allen v. Coltart*, 11 Q. B. Div. 782; *Sanders v. Vanzeller*, 4 Q. B. 294, 45 E. C. L. 294.

65. *Harmon v. New York, etc., R. Co.*, 28 Barb. (N. Y.) 323; *Walker*

means were used to conceal the value or nature of the article, as, for example, the delivery of a trunk without any information as to its more than ordinarily valuable contents, thereby creating the impression that it contained only the ordinary baggage of a passenger, this would be a fraudulent concealment which would release the carrier from liability for any amount in excess of what is ordinarily carried for traveling expenses;⁶⁶ or where the shipper deceives the carrier by his own carelessness in treating the parcel shipped as a thing of no value.⁶⁷ Where there is anything in the external appearance of the package calculated to create a doubt as to its value or indicating that it contains articles of great value, it is the duty of the carrier to make some inquiry of the shipper; it cannot claim exemption but is responsible for its loss, in the absence of fraud, imposition or disguise.⁶⁸ But when the value appears in the package itself and the carrier can determine it for itself such an inquiry would be useless, and a voluntary statement unnecessary.⁶⁹

v. Jackson, 10 M. & W. 168; *Lebeau v. General Steam Nav. Co.*, L. R. 8 C. P. 88. This rule does not extend to carriers of letters, it being practically impossible for the carrier to make inquiry of a shipper. *Hayes v. Wells*, 23 Cal. 185, 83 Am. Dec. 89.

66. *Orange County Bank v. Brown*, 9 Wend. (N. Y.) 85, 24 Am. Dec. 129; *Hawkins v. Hoffman*, 6 Hill (N. Y.), 586; *Galt v. Adams Express Co.*, *McArthur & M.* (D. C.) 124.

But where the shipper informed the carrier that a package shipped by him was valuable, but did not state that it contained money, fraud could not be properly imputed. *Allen v. Sewall*, 2 Wend. (N. Y.) 327.

67. *Relf v. Rapp*, 3 W. & S. (Pa.) 21, 37 Am. Dec. 528; *Hart v. Pennsylvania R. Co.*, 112 U. S. 331, 18 Am. & Eng. R. Cas. 604; *Houston*,

etc., *R. Co. v. Burke*, 55 Tex. 323, 40 Am. Rep. 808, 9 Am. & Eng. R. Cas. 73.

68. *Gorham Mfg. Co. v. Fargo*, 45 How. Pr. (N. Y.) 90, 3 J. & Sp. (N. Y.) 434; *Phillips v. Earle*, 8 Pick. (Mass.) 182; *Merchants' Despatch Transp. Co. v. Bolles*, 80 Ill. 473; *Gulf, etc., R. Co. v. Clark*, 2 Tex. App. Civ. Cas. § 512, 18 Am. & Eng. R. Cas. 628; *Kuter v. Michigan Cent. R. Co.*, 1 Biss. (U. S.) 35.

69. *Van Winkle v. Adams Express Co.*, 3 Robt. (N. Y.) 59; *Boscowitz v. Adams Express Co.*, 93 Ill. 523, 9 Cent. L. J. 389, 34 Am. Rep. 191, 5 Cent. L. J. 58; *Dwight v. Brewster*, 1 Pic. (Mass.) 50, 11 Am. Dec. 133; *Orndorff v. Adams Express Co.*, 3 Bush (Ky.), 194, 96 Am. Dec. 207; *Southern Express Co. v. Crook*, 44 Ala. 468, 4 Am. Rep. 140; *Moses v.*

§ 38. Shipper's duty to state value and character of goods.

It is well settled that when the carrier has not given notice that he would not be answerable for parcels, beyond a specified amount, unless informed of the value, or has made a special acceptance, it is not the duty of the shipper to state the quality or the value, but, when there is neither notice nor special acceptance, the carrier is bound to make inquiry as to the value and character of the article or package received, and the owner must then answer truly, at his peril. And if such inquiries are not made, and the property is received at such price for transportation as is asked with reference to its bulk, weight or external appearance, the carrier is responsible for its loss, whatever may be its value.⁷⁰ But an exception to the rule is made where the articles are dangerous

Boston, etc., R. Co., 24 N. H. 71, 55 Am. Dec. 222.

A connecting carrier, having no means of ascertaining the value of packages shipped, is entitled to regard them of the value they appear to be, no value being stated in the bill of lading, and is responsible accordingly. *Marquette v. Kirkwood*, 45 Mich. 51, 40 Am. Rep. 453, 9 Am. & Eng. R. Cas. 85.

70. *Baldwin v. Liverpool, etc., Steamship Co.*, 74 N. Y. 125, 30 Am. Rep. 277; *Gorham Manf. Co. v. Fargo*, 35 N. Y. Super. Ct. 434; *Sewall v. Allen*, 6 Wend. (N. Y.) 349; *Hollister v. Nowlen*, 19 Wend. (N. Y.) 234, 32 Am. Dec. 455; *Southern Express Co. v. Crook*, 44 Ala. 468, 4 Am. Rep. 140; *Galt v. Adams Express Co., MacArthur & M. (D. C.)* 124; *Merchants' Despatch Transp. Co. v. Bolles*, 80 Ill. 473; *Boscowitz v. Adams Express Co.*, 93 Ill. 523, 34 Am. Rep. 191, 16 Am. & Eng. R. Cas. 102; *Parmalee v. Lowitz*, 74 Ill. 116, 24 Am. Rep. 276;

Baldwin v. Collins, 9 Rob. (La.) 468; *Fassett v. Ruerk*, 3 La. Ann. 694; *Levois v. Gale*, 17 La. Ann. 302; *Little v. Boston, etc., R. Co.*, 66 Me. 239; *Sheldon v. Robinson*, 7 N. H. 157; *Brown v. Camden, etc., R. Co.*, 83 Pa. St. 316; *Camden, etc., R. Co. v. Baldauf*, 16 Pa. St. 67, 55 Am. Dec. 481; *Relf v. Rapp*, 3 W. & S. (Pa.) 21, 37 Am. Dec. 528; *McCune v. Burlington, etc., R. Co.*, 52 Iowa, 600; *Texas Express Co. v. Scott*, 2 Tex. App. Civ. Cas. § 72; *Gulf, etc., R. Co. v. Clark*, 2 Tex. App. Civ. Cas. § 512, 18 Am. & Eng. R. Cas. 628; *Batson v. Donovan*, 4 B. & Ald. 29, 6 E. C. L. 373; *Wallace v. Jackson*, 10 M. & W. 168; *Phillips v. Earle*, 8 Pick. 182; *Brooke v. Pickwick*, 4 Bing. 218, 13 E. C. L. 404; *Macklin v. Waterhouse*, 5 Bing. 212; 15 E. C. L. 421, 2 M. & P. 319; *Sleat v. Fagg*, 5 B. & Ald. 342, 7 E. C. L. 123. See *Hayes v. Wells*, 23 Cal. 185, an express company which carries letters is not liable for the loss of any article of special value contained in

or of a fragile nature requiring special care.⁷¹ A shipper of goods for carriage is bound by an agreed valuation in the bill of lading, and a stipulation that such valuation is to be the limit of recovery in case of loss;⁷² and this is held to be the rule where he makes a statement of the value of the property in answer to the carrier's inquiry, although he did not suppose that his statement would affect the amount of the carrier's liability;⁷³ and where he is silent as to the real value, when he accepts a receipt containing such a stipulation, although there is no inquiry by the carrier, and no artifice to conceal the value or deceive the carrier.⁷⁴ The presumption of law is that a party receiving an instrument of this character in the transaction of business, in the absence of fraud, imposition, concealment, or improper practice or conduct of any kind on the part of the carrier or its agents in the progress of the transaction, is acquainted with its contents.⁷⁵ And understanding that he is securing transportation at a reduced rate by stipulating as to value and assuming a portion of the risk of carriage himself, the shipper cannot subsequently insist that the goods are of greater value for the purpose of increasing his claim for damages for the loss.⁷⁶

a letter envelope, unless at the time of its delivery to them they are informed of its value.

71. *American Express Co. v. Perkins*, 42 Ill. 458; *Crouch v. London, etc., R. Co.*, 14 C. B. 255, 78 E. C. L. 255, 18 Jur. 148, 7 Railw. Cas. 717.

72. *Graves v. Lake Shore, etc., R. Co.*, 137 Mass. 33, 16 Am. & Eng. R. Cas. 108, 50 Am. Rep. 282; *Judson v. Western R. Corp.*, 6 Allen (Mass.), 486, 83 Am. Dec. 646; *J. J. Douglass Co. v. Minnesota Transfer R. Co.*, 62

Minn. 288, 30 L. R. A. 860, 64 N. W. 899, 2 Am. & Eng. R. Cas. N. S. 671.

73. *Coupland v. Housatonic R. Co.*, 61 Conn. 531, 15 L. R. A. 534, 23 Atl. 870, 55 Am. & Eng. R. Cas. 380.

74. *Magnin v. Dinsmore*, 50 N. Y. 168, 62 N. Y. 35, 20 Am. Rep. 442, 70 N. Y. 410, 26 Am. Rep. 608.

75. *Belger v. Dinsmore*, 51 N. Y. 166, 10 Am. Rep. 575.

76. *Durgin v. American Express Co.*, 66 N. H. 277.

CHAPTER XI.

CARRIER'S RELATION TO GOODS AND AUTHORITY OF AGENTS.

- SECTION 1. Carrier's relation to goods.—Rights of the carrier.
2. Power and authority of carrier's general freight agents.
3. Powers and authority of local agents.
4. Authority of other agents and employes.
5. Carrier and insurance company.

§ 1. Carrier's relation to goods—Rights of the carrier.

A common carrier cannot sell goods so as to divest the title of the consignee, and the consignee may follow up the goods, and recover them, or recover the price thereof, from one who has purchased of the carrier and sold them.¹ If a common carrier sells the goods intrusted to it for conveyance, without other authority than that which he has as carrier, he can pass no title. Though he sells the goods for a fair price to one who purchases in good faith, the title of the owner is not affected by the sale, and the purchaser will be responsible to him for them.² But the carrier has the right and it is its duty to sell perishable goods for the benefit of their owner when their further transportation becomes impossible and they are about to perish from decay.³ And it may sell goods by virtue of its lien for charges, but must sell them, in each case, in the manner prescribed by law.⁴ It was formerly held that a common carrier could not dispute the shipper's title to goods delivered to it for transportation, and could not, except in cases of fraud or insolvency of the shipper, have an interpleader between the party from whom it received the goods and an adverse claimant.⁵ The best

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| 1. Ely v. Ehle, 3 N. Y. 506; | 33 Ohio St. 511, 31 Am. Rep. 561. |
| Crumbacker v. Tucker, 9 Ark. 385. | 4. See Carrier's lien for charges, |
| 2. Bailey v. Shaw, 24 N. H. 297, | chap. 16. |
| 55 Am. Dec. 241. | 5. McGaw v. Adams, 14 How. Pr. |
| 3. American Express Co. v. Smith, | (N. Y.) 461. |

considered cases now hold that the right of a third person to which the bailee has yielded, by delivering the property, may be interposed in all cases as a defense to an action brought by the bailor subsequently for the property, and that when the true owner comes and demands his property it is the duty of the carrier to deliver it, and the law will not adjudge the performance of this duty tortious as against a consignor or bailor having no title.⁶ But in an action for negligence in not delivering goods consigned to it by the plaintiff, the carrier cannot defend by showing that the real title to the property is in a third person, who bailed them to the consignor, unless the property has been taken from the carrier's possession by the bailor without injury to the consignor.⁷ Where a carrier delivers property shipped over its road to a third person, under the mistaken belief that he is the person entitled to receive the goods, or delivers to the proper person without requiring the performance of conditions required precedent to delivery, it may maintain an action to recover possession but cannot do so on a simple demand for the return of the property, without returning to such third person the freight charges paid by him on the delivery of the property.⁸ A carrier has such a special property

6. *Western Trans. Co. v. Barber*, 56 N. Y. 544; *Western Transp. Co. v. Hoyt*, 69 N. Y. 230; *Mullins v. Chickering*, 110 N. Y. 514; *German Exchange Bank v. Commissioners*, 57 How. Pr. (N. Y.) 187, 6 Abb. N. C. (N. Y.) 394; *The Idaho*, 93 U. S. 575, 23 L. Ed. 978; *Knapp v. Sprague*, 9 Mass. 262; *Whittier v. Smith*, 11 Mass. 210; *Ogle v. Atkinson*, 5 Taunt. 759; *Wells v. American Express Co.*, 55 Wis. 23, 6 Am. & Eng. R. Cas. 300, 42 Am. Rep. 695; *Sheridan v. New Quay Co.*, 4 C. B. N. S. 618, 93 E. C. L. 618; *Biddle v. Bond*, 6 B. & S. 224.

7. *Great Western R. Co. v. McComas*, 33 Ill. 185.

A consignor of goods may sue a

carrier for breach of the contract of carriage, the contract having been made by the consignor. If he has, in fact, no interest, he may recover for the benefit of the consignee or actual party in interest. *Illinois Cent. R. Co. v. Schwartz*, 13 Ill. App. 490. See also, *Brill v. Grand Trunk R. Co.*, 20 U. C. C. P. 440.

8. *Walker v. Louisville, etc., R. Co.*, 111 Ala. 233, 4 Am. & Eng. R. Cas. N. S. 658, 20 So. 358; *Jones v. Anderson*, 82 Ala. 302; *Jeffersonville R. Co. v. White*, 6 Bush (Ky.), 251; *Evans v. Gale*, 17 N. H. 573, 43 Am. Dec. 614; *Brown v. Hodgson*, 4 Taunt. 189. Compare *Young v. East Alabama R. Co.*, 80 Ala. 100.

in the goods that it may maintain an action, in its own name, for an injury to property intrusted to it for transportation.⁹ A carrier, though it has not received freight, or paid the loss may yet recover damages from another who has caused the loss.¹⁰ If the goods are wrongfully taken from its possession, it may bring action to recover possession or for a wrongful conversion,¹¹ and will be entitled in the latter action, if it recover the full value of the goods, to its interest in the goods, and will hold the balance in trust for the owner, unless it has satisfied such owner for his loss.¹² The right conferred upon the carrier by reason of his special property is not inconsistent with a co-existing right of action for the same cause in the general owner;¹³ but a recovery by the carrier will be a bar to a subsequent action by such general owner.¹⁴ The damages recovered in such cases take the place of the property converted or destroyed, and, upon satisfaction of the judgment recovered by either, the title to the property passes to the party against whom the recovery was had.¹⁵ The rule that a bailee cannot plead *jus tertii*—a right of property in a third person—against his bailor applies generally to common carriers.¹⁶ The reason for the rule is that by such a plea, the bailee or the common

9. *Chicago & A. R. Co. v. Kansas City Suburban Belt R. Co.*, 78 Mo. App. 245, 2 Mo. App. Repr. 204; *Merrick v. Brainard*, 38 Barb. (N. Y.) 574; *Steamboat Co. v. Atkins*, 22 Pa. St. 522; *The Beaconsfield*, 158 U. S. 303.

10. *White v. Bascon*, 28 Vt. 268.

11. *Wingard v. Banning*, 39 Cal. 543.

12. *Ingersoll v. Van Bokkelin*, 7 Cow. (N. Y.) 670; *Woodman v. Nottingham*, 49 N. H. 387; *Steamboat Farmer v. McCraw*, 26 Ala. 189.

13. *Booth v. Terrell*, 16 Ga. 20; *Morgan v. Ide*, 8 Cush. (Mass.) 420.

14. *Ingersoll v. Van Bokkelin*, 7

Cow. (N. Y.) 670; *Lyle v. Barker*, 5 Bin. (Pa.) 457.

15. *Root v. Ohandler*, 10 Wend. (N. Y.) 110; *Strong v. Adams*, 30 Vt. 221; *Spence v. Mitchell*, 9 Ala. 744; *Hart v. Hyde*, 5 Vt. 328; *Bryant v. Clifford*, 13 Metc. (Mass.) 138; *Lovejoy v. Murray*, 3 Wall. (U. S.) 1; *Overby v. McGee*, 15 Ark. 459; *Bishell v. Huntingdon*, 2 N. H. 142; *Chesley v. St. Clair*, 1 N. H. 189.

16. *The Idaho*, 93 U. S. 575, 23 L. Ed. 978; *Valentine v. Long Island R. Co.*, 187 N. Y. 121, 79 N. E. 849; *Simpson v. Wrenn*, 50 Ill. 222, 99 Am. Dec. 511; *Thompson v. Williams*, 30 Kan. 114, 1 Pac. 47; *Pulliam v. Burlingame*, 81 Mo. 111, 51 Am. Rep. 229.

carrier might through the claim of some third person keep the property for himself. But there are many exceptions to this general rule. The rule does not apply where the property has been taken from the bailee by process of law, or by a person having a paramount title, or where the title of the bailor has terminated, or where the bailor was himself a mere agent and the return of the property to him has been forbidden by his principal, or where it appears that the bailor had obtained possession of the property feloniously or tortiously by felony, force, or fraud and the property has been surrendered to the owner or the officers of the law, or where the true owner has demanded the same and the bailee has surrendered the property to him.¹⁷ The rule as laid down in New York is that the bailee cannot set up the title of the third person against his bailor, however tortious the possession of the latter, unless the owner has claimed the property, and the bailee has yielded to the claim.¹⁸ When the bailee has actually delivered the property to the true owner, having a right to the possession, on his demand, it is a sufficient defense against the claim of the bailor. This is the rule as it exists in the United States.¹⁹ In England it has been held that, in an action by the bailor against the bailee, the latter can set up the title of the third person only when he depends upon the right and title and has the authority

17. *N. Y.*—*Valentine v. Long Island R. Co.*, 187 N. Y. 121, 79 N. E. 849; *Mullins v. Chickering*, 110 N. Y. 513, 18 N. E. 377, 1 L. R. A. 463; *Western Transportation Co. v. Barber*, 56 N. Y. 544, *Sedgwick v. Macy*, 24 App. Div. 1, 49 N. Y. Supp. 154; *Bates v. Stanton*, 1 Duer (N. Y.), 79; *Edson v. Weston*, 7 Cow. (N. Y.) 278; *Beardsley v. Richardson*, 11 Wend. (N. Y.) 25.

Mass.—*Edmunds v. Hill*, 133 Mass. 445; *Whittier v. Smith*, 11 Mass. 211; *Bursley v. Hamilton*, 15 Pick. (Mass.) 40, 25 Am. Dec. 423.

Pa.—*King v. Richards*, 6 Whart. (Pa.) 418, 37 Am. Dec. 420.

Wis.—*Wright v. Pratt*, 31 Wis. 99.

Eng.—*Shelby v. Scotsford, Yeber*, 23; *Ogle v. Atherson*, 5 Taunt. 758; *Watson v. Anderton*, 1 Barn. & Ald. 450; *Hardman v. Willcox*, 9 Bing. 382.

18. *Western Transportation Co. v. Barber*, 56 N. Y. 544; *Sedgwick v. Macy*, 24 App. Div. 1, 49 N. Y. Supp. 154.

19. *The Idaho*, 93 U. S. 575, 23 L. Ed. 978.

of that person, and sets up the right for the benefit of that person.²⁰ But where the carrier received the property for transportation in good faith without knowledge that it was its own property and thereafter discovered that the property belonged to it, it may avail itself of such defense with the same force and effect that it could avail itself of the right of a true owner in case of a third person.²¹ If a person not the owner of property or entitled to its possession delivers it to a railroad for shipment, the true owner, who is no party to the contract, may, before delivery by the carrier, demand and reclaim his property, and, as against an action of trover brought for that purpose against the carrier by the true owner, it is no defense that the carrier refused to recognize his title or right, and carried and delivered the property in accordance with the shipment.²² Since a common carrier is a bailee for hire, it may resort to any means to protect the property that the owner could use, and may recover the full value from one who destroys it, though the owner might also have an action.²³

§ 2. Power and authority of carrier's general freight agents.

The general freight agent of a common carrier, in the absence of any notice of a limitation of his authority, should be deemed, as to the public or third parties, to have been authorized by the carrier and clothed with all the power to make contracts for freight, or in respect to the carrying and delivery of freight, that the carrier itself has, and to have the power, therefore, to make valid contracts for the delivery of property at places on other roads beyond the terminus of the carrier's own route.²⁴ Contracts made by

20. *Biddle v. Bond*, 6 Best & S. 225; *Thorne v. Tilbury*, 3 Hurl. & N. 534; *Sheridan v. New Quay Co.*, 4 C. B. (N. S.) 232.

21. *Valentine v. Long Island R. Co.*, 187 N. Y. 121, 79 N. E. 849.

22. *Georgia R., etc., Co. v. Haas*, 127 Ga. 187, 56 S. E. 313.

23. *Pittsburg, etc., Ry. Co. v. City*

of Chicago, 242 Ill. 178, 89 N. E. 1022, affg. 144 Ill. App. 293.

24. *Burtis v. Buffalo, etc., R. Co.*, 24 N. Y. 274; *Grover & B. Sewing Mach. Co. v. Missouri Pac. R. Co.*, 70 Mo. 672, 35 Am. Rep. 444.

The general eastern freight agent of a western railroad being operated by receivers, having his office in New

shipping agents of carriers within reasonable scope of their employment of business are binding on the carriers.²⁵ An agent of a railway company, having authority to contract to place cars at points other than stations for receiving freight, can contract to receive such freight when deposited along the line to await the arrival of cars.²⁶ A railroad agent may limit the company's liability for negligence to its own line.²⁷ A shipper dealing with one who, with the knowledge of his principal, publicly advertises himself as the general agent of a railroad company, both for passengers and freight, having an office in a great commercial center, with employees under him, is warranted in concluding that he had authority to contract.²⁸ The driver of an express company's wagon is the general agent of the company for the purpose of collecting goods for transportation, and he possesses all the necessary implied powers within the scope of his authority for that purpose, so that the company is bound by his statement that a parcel which the consignor's agent offered to re-mark was all right without re-addressing it. There is no legal rule that carriers will take only parcels legibly addressed, or that parcels without address at all may not be given to, and taken by, the carrier's

York, has apparent power, by virtue of his position, to contract for the through carriage of goods, over his line of road and a connecting steamship line across the Pacific, and a contract so made by him, when clear in its terms, will bind the receivers, when the shipper has no notice of any limitation on his authority, and no knowledge that the steamship line is not owned by the railroad company and operated by the receivers. *Farmers Loan & T. Co. v. Northern Pac. R. Co.*, 120 Fed. 873, 57 C. C. A. 533, revg. 112 Fed. 829. A person who has been held out to the public as a general freight agent, for more than

a year, may bind the company by a contract to furnish a certain number of cars, on a specified day, for the transportation of freight. *Baker v. Kansas City, etc., R. Co.*, 91 Mo. 152, 28 Am. & Eng. R. Cas. 61.

25. *Lincoln Tent & Awning Co. v. Missouri Pac. Ry. Co.*, 86 Neb. 338, 125 N. W. 603.

26. *Georgia Southern & F. Ry. Co. v. Marchman*, 121 Ga. 235, 48 S. E. 961.

27. *Miller v. Missouri, K. & T. Ry. Co.*, 157 Mo. App. 638, 138 S. W. 902.

28. *St. Louis, etc., R. Co. v. Elgin Condensed Milk Co.*, 175 Ill. 557, 51 N. E. 911, affg. 74 Ill. App. 619.

driver.²⁹ If two or more carriers are copartners for transporting freight over their respective lines, a contract made by the agents of one of them with a shipper binds them all, in the absence of a stipulation therein to the contrary.³⁰ Where a railroad corporation is operated in connection with other roads, and is a part of the system, it is bound by the acts and declarations of the agents of other companies which form a part of such system, and which are made to induce shipments over the system.³¹ An agent, employed to solicit traffic for a foreign railroad company having no line of road in the State, has implied authority to bind his principal for the safe delivery of goods at a point beyond its own lines, and to contract over what road beyond that line the property shall be transported.³² But a general agent for the State, of a common carrier, has no apparent authority to waive in favor of a particular shipper a condition imposed by the rules of the company as to free insurance of shipments, where he had never before exceeded his actual instructions in that respect, and the shipper was aware of the instructions from the carrier which required compliance with such condition, although the agent stated to him that it only applied to large shippers, and not to him; and the carrier is not bound by the agent's attempted waiver.³³ Where a traveling freight agent of a common carrier, with authority to solicit freight

29. *Magnus v. Platt*, 62 Misc. Rep. (N. Y.) 499, 115 N. Y. Supp. 824.

Where, by its business methods and its uniform course of dealing, an express company holds out persons who drive wagons marked with its name, and are uniformed with caps bearing its name, as authorized to receive goods for transportation, and delivery is made to such persons, both a jury and a referee may draw the inference that such person was the agent of the express company. *Reel v. Adams Express Co.*, 27 Pa. Super. Ct. 77.

30. *Crockett v. St. Louis & H. Ry. Co.*, 147 Mo. App. 347, 126 S. W. 243.

31. *Missouri, etc., R. Co. v. Wells* (Tex. Civ. App.), 58 S. W. 842.

And in an action for delay and negligence in executing a contract for carriage of stock, evidence of statements and representations made by the general agent of the system to induce such shipment is inadmissible. *Id.*

32. *Fremont, etc., R. Co. v. New York, etc., R. Co.* (Neb.), 92 N. W. 131; *New York, etc., R. Co. v. Fremont, etc., R. Co.* *Id.*

33. *Leinkauf v. Lombard, A. & Co.*, 12 App. Div. (N. Y.) 302, 42 N. Y. Supp. 391.

business, and with special authority to contract for shipments of freight on special conditions as to movements of trains, contracts for the shipment of freight, without disclosing the conditions limiting his authority, the principal is bound by his act, and is liable for resulting damages.³⁴ Where, on the question of a soliciting freight agent's authority to bind the company by a time contract as to freight, it was shown that, with authority, he had negotiated a settlement arising out of a previous contract with the same shipper, that the company had recognized the settlement, and paid the amount stipulated, which was part consideration of the new contract, and for a month carried out the new contract, it was held, that the shipper was justified in regarding him as general agent for that branch of the business.³⁵ A carrier is bound by a bill of lading issued by its agent, though without actual receipt of the goods.³⁶ Where connecting railroads, forming a through line, enter into an arrangement by which they employ an agent to solicit freight, and the agent issues a bill of lading before the initial carrier receives the goods, and with knowledge that the bill of lading is to accompany a draft on the consignee, and the consignee pays the draft, but the goods are never received either by the consignee or any of the railroads, the consignee can recover the amount of the draft from the terminal carrier, since, apart from the question of partnership, there is a joint liability on the part of all the companies on whose behalf the bill of lading was issued.³⁷ A person contracting with a carrier, through its agent,

34. *Baker & Penniston v. Chicago, etc., R. Co.* (Minn.), 97 N. W. 650.

35. *Graves v. Miami S. S. Co.*, 29 Misc. Rep. (N. Y.) 645, 61 N. Y. Supp. 115. See *Brandenstein v. Douglass*, 105 Ga. 845; *Drohan v. Lumber Co.*, 75 Minn. 251.

36. *Missouri, K & T. Ry. Co. v. Hutchings, Sealy & Co.*, 78 Kan. 758, 99 Pac. 230.

But see *St. Louis, I. M. & S. Ry. Co. v. Citizens' Bank of Little Rock*,

87 Ark. 26, 112 S. W. 154, holding that, it is not within the scope of the authority of the agents of a carrier to issue bills of lading for goods not actually received under the provisions of a State statute.

Whether or not a bill of lading was signed by a certain person as agent for the carrier is a question of fact for the jury. *Tishomingo Sav. Inst. v. Johnson, Nesbit & Co.*, 146 Ala. 691, 40 So. 503.

37. *Dulaney & Wharton v. Philadel-*

for the transportation of goods, is not chargeable with notice of limitation of the agent's right to contract, when he is a general agent of the company in charge of its business at the place where the contract is made and the contract is the kind usually made by such agents. A statement in the blanks and literature issued by the agent of a steamship company that insurance on consigned goods was free when the value was declared before the sailing of the steamer does not charge a shipper having knowledge thereof with notice that the agent has no authority to insure goods without such valuation.³⁸ But the unauthorized issuance by the agent of a steamship company of bills of lading to a purchaser for goods then in a public warehouse, subject to the orders of the seller, who is bound by the terms of the sale to deliver the same on board, does not bind the company, so as to make it responsible for the goods while in the warehouse and before their actual delivery into its custody; and even an acceptance of the goods on board ship is a ratification of the contract of carriage made by the bills of lading only from the time of such delivery.³⁹ The general rule is that where an entire business is placed under the management of an agent, the authority of the agent may be presumed to be commensurate with the necessities of the situation. The powers of the agent are, *prima facie*, co-extensive with the business entrusted to his care and will not be narrowed by limitations not communicated to the person with whom he deals. The authority of an agent may be implied in many cases from his official designation, the position in which he is placed, and the duties which naturally appertain thereto. Parties may deal with the agents of corporations upon the presumption that they possess the powers usually assigned to

phia & R. Ry. Co., 228 Pa. 180, 77 Atl. 507.

38. Lowenstein v. Lombard, Ayres & Co., 164 N. Y. 324, 58 N. E. 44, revg. 45 N. Y. Supp. 286.

39. Cunard S. S. Co. v. Kelly, 115 Fed. 678.

The company does not ratify such

act and make the bills its own by receiving on board one of its vessels goods purporting to be those described in the bills, where by reason of a fraudulent substitution in the warehouse, of which it was ignorant, the goods actually delivered to it are not the same. *Id.*

the office they hold, and the principal is bound as to third persons acting in good faith, by the act of an agent within his apparent authority, although in the particular instance it was unauthorized. The implied authority of an agent in the absence of notice to the contrary is the measure of his apparent authority.⁴⁰ The testimony of the live stock agent of a railroad company that he had authority to contract for cars to ship cattle was sufficient to show him a general agent who could bind the carrier by a contract to furnish cars.⁴¹ If a carrier's live stock agent did not have authority to make a contract with a shipper to ship by a certain train on a connecting line, the carrier ratified the contract by billing the car and forwarding it to its junction for shipment on the connecting line.⁴²

§ 3. Powers and authority of local agents.

Prima facie a station agent or baggage master, as such, can bind his company only by contracts of carriage to the end of its road; and authority to bind the company by contracts beyond such point must be shown in order to hold the company liable.⁴³ A local station agent or freight agent has no power to make a special agree-

40. *Lowenstein v. Lombard*, Ayres & Co., 164 N. Y. 324, 58 N. E. 44; *Isaacson v. New York Cent., etc., R. Co.*, 94 N. Y. 278, 46 Am. Rep. 142; *Talcott v. Wabash R. Co.*, 159 N. Y. 461; *Trimble v. New York Cent., etc., R. Co.*, 162 N. Y. 84.

41. *Missouri, K. & T. Ry. Co. of Texas v. Kyser & Sutherland*, 38 Tex. Civ. App. 355, 87 S. W. 389.

Evidence of contracts of a witness with the agent of the railway company, by which cars had been furnished at a certain place, was admissible to show that such agent's contract with plaintiff to furnish cars at the same place was within the scope of his authority. *Pecos River R. Co.*

v. Latham, 40 Tex. Civ. App. 78, 83 S. W. 392.

42. *Kirby v. Chicago & A. R. Co.*, 242 Ill. 418, 90 N. E. 252.

43. *Marmonstein v. Pennsylvania R. Co.*, 13 Misc. Rep. (N. Y.) 32, 65 St. Rep. (N. Y.) 877, 34 N. Y. Supp. 97, revg. 32 N. Y. Supp. 1146; *Minter v. Southern Kansas R. Co.*, 56 Mo. App. 282; *Turner v. St. Louis, etc., R. Co.*, 20 Mo. App. 632; *Patterson v. Kansas City, etc., R. Co.*, 47 Mo. App. 570; *Crouch v. Louisville, etc., R. Co.*, 42 Mo. App. 248; *White v. Missouri Pac. R. Co.*, 19 Mo. App. 400; *Loomis v. Wabash, etc., R. Co.*, 17 Mo. App. 340; *Hansen v. Flint, etc., R. Co.*, 73 Wis. 346, 9 Am. St. Rep. 791.

ment extending the liability of his company for shipments beyond its own line, unless it has been expressly conferred upon him or may be implied from the course of business, or the company has held itself out as a common carrier to such points.⁴⁴ A station agent authorized to receive and forward freight may bind the company by a contract which is beyond his real authority, but within the scope of his apparent authority, unless the other party had knowledge of the fact that he was acting beyond his actual authority.⁴⁵ A local station agent is not presumed to have had authority to bind his company to a contract to ship property over connecting lines from the mere fact that he collected the freight for the entire distance.⁴⁶ A station agent's authority to bind a railroad in a contract of carriage to a point on the line of a connecting carrier must be proved in order to hold his company liable for loss or damage occurring on the line of the connecting carrier. Such authority may be inferred from evidence of a previous course of dealing between the shipper and the carrier.⁴⁷ A railway station

44. *Hoffman v. Cumberland Valley R. Co.*, 85 Md. 391, 37 Atl. 214; *Grover & B. Mach. Co. v. Missouri Pac. R. Co.*, 79 Mo. 672; *Burroughs v. Norwich, etc., R. Co.*, 100 Mass. 26; *Wolfe v. Lehigh Valley R. Co.*, 9 Kulp (Pa.), 401, and such authority will not be implied from previous acts and conduct; *Ogdensburg, etc., R. Co. v. Pratt*, 22 Wall. (U. S.) 124; *Blackburn v. Chicago, R. I. & G. Ry. Co.*, 52 Tex. Civ. App. 443, 115 S. W. 874.

45. *Gann v. Chicago, etc., R. Co.*, 72 Mo. App. 34; *Miller v. Chicago, etc., R. Co.*, 1 Mo. App. Rep. 474.

Where there was evidence that plaintiffs contracted with a live stock agent of defendant railway for the shipment of cattle, and the cattle were delivered at the station, and the station agent knew of the contract

between plaintiffs and the live stock agent, and the evidence was sufficient to create in him as great an authority as that apparently exercised by a station agent with whom the public must contract for shipment, and the plaintiffs had no knowledge of any limitations on his power, they were warranted in believing that he had authority equal to that which could be exercised by the station agent. *Gulf, C. & S. F. Ry. Co. v. Jackson & Edwards*, 99 Tex. 343, 89 S. W. 968, revg. (Tex. Civ. App.), 86 S. W. 47.

46. *Coates v. Chicago, etc., R. Co.*, 8 S. D. 173, 65 N. W. 1067; *Sutton v. Chicago, etc., R. Co. (S. D.)*, 84 N. W. 396.

47. *Faulkner v. Chicago, etc., R. Co. (Mo. App.)*, 73 S. W. 927.

A station agent who has for six months been issuing bills of lading to

agent, authorized to receive and forward freight or invested with a general power to contract for transportation, has implied authority to contract to furnish a certain number of cars at his station on a specified day,⁴⁸ or to have cars on hand at a certain time to carry certain goods,⁴⁹ or to forward freight without delay,⁵⁰ or to ship and unload live stock,⁵¹ the shipper having no knowledge or notice of any limitation of such power. Station agents are presumed to have power to make contracts for their railroads for the

points beyond the line of his employer's road has ostensible authority to make a contract of shipment for such a point, although he has instructions from his principal not to make such contracts, where the shipper did not know or could not have known, by the exercise of proper diligence, of the existence of such instructions. *Gulf, etc., R. Co. v. Cole*, (Tex. Civ. App.), 28 S. W. 391. The conclusion that a station agent at a certain city the business establishments of which extend over a considerable territory, not all within the city limits, had authority to contract for the carriage of freight from one of such establishments, outside the city limits, on another railroad, and not contiguous to his company's tracks, is supported by evidence that he and his predecessors had always represented the company in its dealings with freighters on the tracks of other roads, and with reference to certain of such establishments outside the city limits, and by correspondence as to the transaction in question between him and the company's general freight agent, showing the understanding of both that any such dealings which the company might have fell within his province

and duty. *Bigelow v. Chicago, etc., R. Co.*, 104 Wis. 109, 80 N. W. 95. See *Gulf, etc., R. Co. v. Dinwiddie*, 21 Tex. Civ. App. 339; *Rudell v. Ogdensburg Transit Co.*, 117 Mich. 568, 5 Det. L. N. 497, 76 N. W. 380, 44 L. R. A. 415.

48. *Gulf, etc., R. Co. v. Irvine & Woods* (Tex. Civ. App.), 73 S. W. 540; *Harrison v. Missouri Pac. R. Co.*, 74 Mo. 364, 41 Am. Rep. 318; *Gulf, etc., R. Co. v. Wright*, 1 Tex. Civ. App. 402; *Gulf, etc., R. Co. v. Martin* (Tex. Civ. App.), 28 S. W. 576.

49. *Stoner v. Chicago, etc., R. Co.*, 109 Iowa, 551, 80 N. W. 569; *Wood v. Chicago, etc., R. Co.*, 68 Iowa, 491, 24 Am. & Eng. R. Cas. 91, 56 Am. Rep. 861, revg. 59 Iowa, 196, 21 Am. & Eng. R. Cas. 38.

50. *Harrell v. Wilmington, etc., R. Co.*, 106 N. C. 258, 42 Am. & Eng. R. Cas. 421; *Deming v. Grand Trunk R. Co.*, 48 N. H. 455, 2 Am. Rep. 267, so held, although such agent testified that he only had charge of the receiving and forwarding and had no authority to make contracts of af-freightment and no control of the locomotive power of the road.

51. *Lake Erie, etc., R. Co. v. Rosenberg*, 31 Ill. App. 47.

transportation of freight. The limitations on their powers the public cannot take notice of, unless they are conveyed to the public in such a manner as to authorize the inference that shippers are apprised of them.⁵² But a station agent at one point on a railroad has no implied authority to make a contract for furnishing cars at another station.⁵³ Where the contract for furnishing cars for shipment of stock, or for other purposes, is one within the apparent scope of the agent's authority, its validity will not be affected by the fact that the agent had special instructions limiting his authority in such matters, no knowledge of such instructions by the shipper being shown.⁵⁴ A shipper contracting with a railroad station agent for the transportation of freight is under no legal obligation to make inquiries concerning the station agent's instructions or powers.⁵⁵ Where the agent of an express company

52. *Pruitt v. Hannibal, etc. R. Co.*, 62 Mo. 527; *Newport News, etc., R. Co. v. Mercer*, 96 Ky. 475; *Chicago, etc., R. Co. v. Wolcott*, 141 Ind. 267; *Gelvin v. Kansas City, etc., R. Co.*, 21 Mo. App. 273. Compare *Missouri Pac. R. Co. v. Carpenter*, 44 Kan. 257.

53. *Gulf, etc., R. Co. v. Hodge*, 10 Tex. Civ. App. 543, 30 S. W. 829; *Easton v. Dudley*, 78 Tex. 236, 45 Am. & Eng. R. Cas. 340; *Voorhees v. Chicago, etc., R. Co.*, 71 Iowa, 735, 60 Am. Rep. 823, 29 Am. & Eng. R. Cas. 822; *Missouri Pac. R. Co. v. Stults*, 31 Kan. 752, 15 Am. & Eng. 3. Cas. 97. But see *Miller v. Chicago, etc., R. Co.*, 1 Mo. App. Rep. 474, holding that a station agent may bind his company by a contract to furnish cars at another station at a specified time to a shipper of stock; *Grimes v. Lake Erie & W. Ry. Co.*, 142 Ill. App. 532, holding that a station agent has apparent, if not implied authority to

bind the carrier to furnish a car at a specified time and place.

54. *International, etc., R. Co. v. True*, (Tex. Civ. App.) 57 S. W. 977; *Cross v. Graves*, 4 Tex. App. Civ. Cas., § 100; *New York L. Ins. Co. v. Rohrbough*, 2 Tex. App. Civ. Cas., § 217; *Watkins v. Morley*, 2 Tex. App. Civ. Cas., § 727; *Lillard v. Mitchell*, 3 Tex. Civ. App. Cas., § 457; *Page v. London, etc., R. Co.*, 16 W. R. 566.

When a railroad company issued explicit orders to a local agent of its road as to the rates to be charged on different classes of freight, it will not be liable for delay in transportation of freight under a contract with the agent as shipper in violation of such instructions. *Central of Georgia R. Co. v. Felton*, 110 Ga. 597, 36 S. E. 93.

55. *San Antonio, etc., R. Co. v. Williams*, (Tex. Civ. App.) 57 S. W. 883. Since an oral contract by a rail-

has followed certain methods of doing business for a long period of years, the express company will be presumed to know and approve of the methods, and is liable for the acts of the agent.⁵⁶ A carrier's local agent, on receiving a shipment, could bind the carrier by an agreement not to deliver without surrender of the bill of lading which the shipper attached to a draft upon the consignee.⁵⁷ But a station agent cannot bind his company by a contract to forward freight by a passenger train,⁵⁸ or beyond what may be fairly presumed, from the character of his employment, to be his authority,⁵⁹ as, for example, permitting goods to remain in its warehouse, after they have been delivered to the owner and his receipt taken therefor;⁶⁰ nor even to the latter extent, if the consignor has notice of his special and limited authority.⁶¹ Admissions made by the carrier's agent after a loss has occurred do not bind the company and are not admissible to prove negligence on the part of the carrier.⁶² An agent cannot bind his company when acting in fraud of the company's rights or in plain contravention of his duty, as where he acknowledges the receipt of goods which were never received;⁶³ nor when acting in defiance to the known

road station agent for the transportation of stock is binding unless the shipper has knowledge that the agent has no authority to make such contract, it was not error, in an action against a railroad on such a contract, to refuse to charge on defendant's plea setting up the agent's want of authority to enter into an oral contract. *Id.*

56. *Springer v. Westcott*, 166 N. Y. 117, 59 N. E. 693.

57. *Sturges v. Detroit, G. H. & M. Ry. Co.*, 166 Mich. 231, 131 N. W. 706; 18 *Detroit Leg. N.* 377.

58. *Elkins v. Boston, etc., R. Co.*, 23 N. H. 275.

59. *Great Western R. Co. v. Willis*,

18 C. B. N. S. 748, 114 E. C. L. 748, 34 L. J. C. P. 195; *Horne v. Midland R. Co.*, L. R. 8 C. P. 131, 42 L. J. C. P. 59.

60. *Mulligan v. Northern Pac. R. Co.*, 4 Dak. 315, 27 Am. & Eng. R. Cas. 33.

61. *Walker v. York, etc., R. Co.*, 2 El. & Bl. 750, 75 E. C. L. 750, 23 L. J. Q. B. 73.

62. *Boston, etc., R. Co. v. Ordway*, 140 Mass. 510, 25 Am. & Eng. R. Cas. 413, note; *Branch v. Wilmington, etc., R. Co.*, 88 N. C. 573, 18 Am. & Eng. R. Cas. 621.

63. *Coleman v. Riches*, 16 C. B. 104, 81 E. C. L. 104, 24 L. J. C. P. 125.

course of business of the company.⁶⁴ A contract by a carrier to deliver goods at destination at a certain time, which allows the usual period for making the trip, is within the general authority of the carrier's agent.⁶⁵ An agent of a railroad company may, where it has become impossible to perform a contract for the shipment of stock, because of a strike on the railroad, enter into a new agreement with the shipper to pay the expenses incurred by the latter in taking care of and feeding the stock until they can be shipped, where the original contract does not require the shipper to perform any services in connection with the transportation of the stock.⁶⁶ Special authority from the carrier must be shown in order to make any act of the carrier's agent binding on the carrier, when such act is beyond the ordinary and usual powers of the agent.⁶⁷ The acts of a station agent as the representative of a shipper by whom he is employed to purchase goods for him and hold and ship them under his directions, do not bind the carrier, though he is also the carrier's local agent, since he cannot assume to act in a dual capacity where the interests of the parties are conflicting.⁶⁸ Where the defendant, through its station agent, contracted to carry plaintiff's goods to a point in Canada, plaintiff had a right to rely on the agreement by the agent that the company would advance the customs duties, unless he had notice that the agent had no such authority.⁶⁹ Where a local agent has transcended his authority in making a contract, yet if the carrier has

64. *Slim v. Great Northern R. Co.*, 14 C. B. 647, 78 E. C. L. 647, 23 L. J. C. P. 166; *Belfast, etc., R. Co. v. Keys*, 9; H. L. Cas. 556.

65. *Rudell v. Ogdensburg Transit Co.*, 117 Mich. 568, 5 Det. L. N. 497, 76 N. W. 380, 44 L. R. A. 415.

66. *Carstens v. Burleigh*, 20 Wash. 283, 55 Pac. 221.

67. *Giles v. Taff Vale R. Co.*, 2 El. & Bl. 822, 75 E. C. L. 822, 18 Jur. 510, 23 L. J. Q. B. 43.

68. *Sumner v. Charlotte, etc., R. Co.*, 78 N. C. 289.

69. *Waldron v. Canadian Pac. R. Co.*, 22 Wash. 253, 60 Pac. 653. Citing *Wood v. Chicago, etc., R. Co.*, 68 Iowa, 491, 27 N. W. 473; *Deming v. Grand Trunk R. Co.*, 48 N. H. 455; *Pruitt v. Hannibal, etc., R. Co.*, 62 Mo. 627; *Harrison v. Missouri Pac. R. Co.*, 74 Mo. 364; *Guesnard v. Railroad Co.*, 23 Am. & Eng. Cas. 691.

availed itself of the benefits of the contract made by the agent, it cannot afterwards repudiate the agreement on the ground that the agent has exceeded his authority.⁷⁰ But where a shipper shipped some goods over a carrier's line, and persuaded the carrier's local agent to write on the bill of lading that the car was to be switched to a certain street at destination, the agent stating that the carrier had no switching facilities at that street and protesting against so billing the shipment, the agent had no authority to agree to bill the goods to that point, and the shipper could not, under the circumstances, recover for the carrier's failure to deliver the goods as required by the bill of lading.⁷¹ A railroad company is not bound by the assent of its station agent to a shipper's written instruction as to the selection of a connecting carrier, when the agent told the shipper that the "office at H. (the terminal) generally took their own route, and would not pay any attention to him," the assent thereto being insufficient.⁷² Though the agent of a carrier at a certain station resigned, and his resignation was accepted, yet, no one else having been appointed for a year, and the company having in the interim left the station keys with him, and he having personally seen to billing freight, though he did not sign the bills of lading, and no notice of his discharge having been given the public, but he having been permitted to act substantially as he had done before, the carrier was estopped by its acquiescence to question his authority as agent as between it and shippers who dealt with him.⁷³

70. *Toledo, etc., R. Co. v. Elliott*, 76 Ill. 67; *Nashville, etc., R. Co. v. Smith*, (Ala.) 31 So. 481.

71. *Illinois Cent. R. Co. v. Swanson*, 92 Miss. 485, 46 So. 83.

72. *Wm. H. Bessling & Co. v. Houston, etc., R. Co.*, 35 Tex. Civ. App. 470, 80 S. W. 639.

Where the contract between a carrier and a shipper, as evidenced by the bill of lading, is that the goods shall be transported over the car-

rier's line to a certain place, and delivered to another carrier for transportation to their destination, the receiving carrier is not bound by the statements of a station agent as to the rate that would be charged by the connecting carrier. *McLagan v. Chicago, etc., R. Co.*, (Iowa) 89 N. W. 233.

73. *Louisville & N. R. Co. v. Mink*, 31 Ky. Law Rep. 833, 103 S. W. 294.

§ 4. Authority of other agents or employees.

Where shippers of freight filled out in their own blank freight receipt books, printed by an express company, a receipt, describing the freight, the consignee, and his address, and tendered it to an employe of the express company, for signature, at the shipper's store, and the employe signed and returned it, it constituted a special contract, whose conditions were binding on the principals.⁷⁴ Defendant having made an express contract with plaintiff to get his trunk in C. and deliver it to him in L., and the trunk having been delivered afterwards for plaintiff to a person who was acting as an agent employed by defendant to get it, defendant is liable for the loss.⁷⁵ One held out by a railroad company as its freight claim agent has authority to waive a requirement in a live stock contract that a claim for loss shall be verified by the affidavit of the shipper.⁷⁶ The agent of a terminal route who receives, hauls, and delivers consignment of goods, is in respect thereto an agent of the connecting line.⁷⁷ A carrier is bound by the promise of a freight train conductor to furnish cars for a shipment, where he has been intrusted generally with such power and accustomed to exercise it.⁷⁸ A railroad company is not bound by a promise made by the clerk of its auditor to pay the consignor for goods delayed in transportation, and subsequently refused by the consignee, in the absence of any evidence of his authority.⁷⁹ In the absence of the local agent at the station to which goods represented by a bill of lading are consigned, a demand upon any agent of the company in general control is sufficient to justify suit against the company for the goods.⁸⁰ Where a carrier had thirty-five or forty employes

74. *Bernstein v. Weir*, 40 Misc. Rep. (N. Y.) 635, 83 N. Y. Supp. 48.

75. *Hamil v. New York, etc., Exp. Co.*, 177 Mass. 474, 59 N. E. 75.

76. *Cleveland, etc., R. Co. v. Heath*, 22 Ind. App. 47, 1 Repr. 752, 53 N. E. 198.

77. *St. Louis, etc., R. Co. v. Elgin*

Condensed Milk Co., 175 Ill. 557, 51 N. E. 911.

78. *Georgia Coast & P. R. Co. v. Durrence & Sands*, 6 Ga. App. 615, 65 S. E. 583.

79. *Gulf, etc., R. Co. v. Jacobs*, 3 Tex. Civ. App. 485, 23 S. W. 145.

80. *Walters v. Western, etc., R. Co.*, 66 Fed. 862, affg. 63 Fed. 391.

in a freight office, only three of whom were authorized to make shipping contracts, notice of special damages likely to result from delay in a shipment given to the person who caused the bill of lading to be executed, and who was put forward to transact the business for the carrier, was notice to it.⁸¹ The shipping report signed by the plaintiff and the agent of the connecting line at the connecting point could not change or affect the written contracts between plaintiff and defendant.⁸² Where a charter party provides a liability for demurrage for delay in unloading at a foreign port, which is within easy cable communication with the owner, the master cannot settle the claim for such demurrage for less than the sum due.⁸³ Where a carrier, having shipped cotton under order bills, delivered the same to a compress company at destination as a warehouseman, the compress company became the agent of the carrier to take up the carrier's bills of lading, and issue warehouse receipts therefor.⁸⁴

§ 5. Carrier and insurance company.

The carrier may insure goods intrusted to it, not only for the amount of its special property in them, but for the full amount of their value, but in such case the amount of the insurance, over and above the amount due it by the owner for freight, advances, and any sums paid to the owner for the loss of or damage to the goods, inures to the benefit of the owner.⁸⁵ And the carrier may

81. *Chicago, R. I. & P. Ry. Co. v. Planters' Gin & Oil Co.*, 88 Ark. 77, 113 S. W. 352.

82. *San Antonio, etc., R. Co. v. Barnett*, (Tex. Civ. App.) 66 S. W. 474.

83. *Randall v. Brodhead*, 60 App. Div. (N. Y.) 567, 70 N. Y. Supp. 43

84. *St. Louis, I. M. & S. Ry. Co. v. Citizens' Bank of Little Rock*, 87 Ark. 26, 112 S. W. 154.

85. *Waring v. Indemnity Fire Ins. Co.*, 45 N. Y. 606, 6 Am. Rep. 146; *Savage v. Corn Exch. F., etc.*,

Co., 4 Bosw. (N. Y.) 1, 36 N. Y. 655; *Stillwell v. Staples*, 19 N. Y. 401; *Chase v. Washington Mut. Ins. Co.*, 12 Barb. (N. Y.) 595; *Van Natta v. Mutual Security Ins. Co.*, 2 Sandf. (N. Y.) 490; *Eastern R. Co. v. Relief F. Ins. Co.*, 98 Mass. 420; *Phoenix Ins. Co. v. Erie, etc., Transp. Co.*, 10 Biss. (U. S.) 18; *Pennifeather v. Baltimore Steam Packet Co.*, 58 Fed. 481; *Minneapolis, etc., R. Co. v. Home Ins. Co.*, 55 Minn. 236.

stipulate with the owner that it shall be entitled to the benefit of any insurance which the shipper may have effected on the goods, and in such case may maintain the same action on the policy as the shipper himself might maintain.⁸⁶ But the carrier cannot insist upon the owner or shipper insuring the goods for its benefit as a condition precedent to its receiving the goods for transportation.⁸⁷ An underwriter is entitled to recover from the carrier money advanced under a policy of marine insurance where it appeared that there had been a loss due to negligence and the amount thereof was advanced by the underwriter as a loan.⁸⁸

86. *Fayerweather v. Phoenix Ins. Co.*, 118 N. Y. 324, and the assured cannot recover where he has accepted a bill of lading containing such a stipulation; *Rintoul v. New York Cent., etc., R. Co.*, 17 Fed. 905, 21 Blatchf. (U. S.) 439; *Hart v. Western R. Corp.*, 13 Metc. (Mass.) 99; *British, etc., Ins. Co. v. Gulf, etc., R. Co.*, 63 Tex. 475; *Missouri Pac. R. Co. v. International Marine Ins. Co.*, 84 Tex. 149. See also *Liverpool, etc.,*

Steam Co. v. Phoenix Ins. Co., 129 U. S. 397; *Liverpool, etc., Steam Co. v. Ins. Co. of N. A.*, 129 U. S. 464.

87. *Inman v. South Carolina R. Co.*, 129 U. S. 128; *Insurance Co. of N. A. v. Eaton*, 73 Tex. 167. See also *Willock v. Pennsylvania R. Co.*, 166 Pa. St. 184.

88. *Bradley v. Lehigh Val. R. Co.*, (U. S. S. D. N. Y.) N. Y. Law Journal, March 10, 1906.

CHAPTER XII.

NEGLIGENCE OF CARRIER.

- SECTION** 1. General rule of liability as to negligence of carrier.
2. Negligence must have been proximate cause of injury.
3. Negligence in stowage of goods. *

§ 1. General rule of liability as to negligence of carrier.

By negligence is meant a failure to use such care and precaution as a person of ordinary care and prudence would use under like circumstances.¹ In order to maintain an action for injury to person or property arising from negligence, there must be shown to exist some obligation or duty toward the plaintiff which the defendant has left undischarged.² Every defendant is to be held liable for all those consequences which might have been seen and expected as the result of his conduct, but not for those which he could not have foreseen, and was therefore under no moral obligation to take

1. *Mangam v. Brooklyn R. Co.*, 38 N. Y. 455; *Patton v. Southern R. Co.*, 82 Fed. 979, 42 U. S. App. 567, 27 C. A. 287; *Missouri, etc., R. Co. v. Wood*, (Tex. Civ. App.) 81 S. W. 1187; *Hanlon v. Milwaukee, etc., R. Co.*, (Wis.) 95 N. W. 100; *Louisville, etc., R. Co. v. Logsdon*, 24 Ky. L. Rep. 1566, 71 S. W. 905; *St. Louis, etc., R. Co. v. Brown*, (Tex. Civ. App.) 69 S. W. 1010; *Anderson v. Union Terminal R. Co.*, 161 Mo. 411, 61 S. W. 874; *Western, etc., R. Co. v. Vaughan*, 113 Ga. 354, 38 S. E. 851; *Bradley v. Ohio River, etc., R. Co.*, 126 N. C. 735, 36 S. E. 181.

Ordinary care is the care and prudence of an ordinary prudent man. *Ford v. Kansas City*, 181 Mo. 137,

79 S. W. 923. Such care as an ordinary prudent person exercises on any and all occasions, and not such as such a person usually exercises. *Chicago City R. Co. v. Schuler*, 111 Ill. App. 470.

2. *Cleveland, etc., R. Co. v. Cline*, 111 Ill. App. 416; *Baltimore, etc., R. Co. v. Cox*, 66 Ohio St. 276, 64 N. E. 119; *Hunter v. Kansas City, etc., R. Co.*, 85 Fed. 379, 54 U. S. App. 653, 29 C. C. A. 206; *Rosen v. Chicago, etc., R. Co.*, 83 Fed. 300, 49 U. S. App. 647, 27 C. C. A. 534; *Baltimore, etc., R. Co. v. Nugent*, 86 Md. 349, 38 Atl. 779, 39 L. R. A. 161; *Cleveland, etc., R. Co. v. Ballentine*, 84 Fed. 935, 56 U. S. App. 266, 23 C. C. A. 572.

into consideration.³ All distinctions in the degrees of negligence are now generally disregarded by the courts, it being held that the terms slight, ordinary and gross negligence can no longer be usefully applied in practice.⁴ Wanton or wilful negligence is such a gross want of care and regard for the rights of others as to imply a total disregard of consequences or a willingness or intention to inflict injury; and whether a particular act is wanton or wilful negligence is largely dependent on the particular circumstances of each case.⁵ There is no fixed and invariable rule for determining the duty of the carrier in respect to the care required of it in the transportation of property other than that it is required to use reasonable care and diligence for the proper and safe carriage and delivery of the property, and what is reasonable, as to care, speed,

3. *Loftus v. Union Ferry Co.*, 84 N. Y. 455, 38 Am. Rep. 533; *Hubbell v. Yonkers*, 104 N. Y. 434, 58 Am. Rep. 522; *Cleveland, etc., R. Co. v. Lindsay*, 109 Ill. App. 533; *Gosa v. Southern Ry.*, 67 S. C. 347, 45 S. E. 810; *Indianapolis St. Ry. Co. v. Darnell*, 1 St. Ry. Rep. 237, 32 Ind. App. 687, 68 N. E. 609, it will not be inferred when the result of wrongful conduct may reasonably be attributed to negligence or inattention; *Kirby v. Delaware, etc., Canal Co.*, 20 App. Div. (N. Y.) 473, 46 N. Y. Supp. 777; *New Orleans, etc., R. Co. v. McEwen & Murray*, 49 La. Ann. 1184, 38 L. R. A. 134, 7 Am. & Eng. R. Cas. N. S. 742, 22 So. 675; *Mars v. Delaware, etc., Canal Co.*, 54 Hun (N. Y.) 625; *Dicken v. Liverpool, etc., Co.*, 41 W. Va. 511; *Charlebois v. Gogebie, etc., R. Co.*, 91 Mich. 59.

4. *Magrane v. St. Louis, etc., R. Co.*, 183 Mo. 119, 81 S. W. 1158; *Perkins v. New York Cent. R. Co.*, 24 N. Y. 196; *Briggs v. Taylor*, 28 Vt. 180; *Stringer v. Alabama, etc., R. Co.*, 99

Ala. 497, 13 So. 75; *People v. Union Pac. R. Co.*, 114 Fed. 123, 51 C. C. A. 564, 57 L. R. A. 700; *Denver, etc., R. Co. v. Peterson*, (Colo.) 69 Pac. 578; *Steamboat New World v. King*, 16 How. (U. S.) 474; *Milwaukee, etc., R. Co. v. Arms*, 91 U. S. 495; *New York Cent. R. Co. v. Lockwood*, 17 Wall. (U. S.) 357; *Hinton v. Dibble*, 2 Ad. & El. N. S. 661, 42 E. C. L. 661; *Nellis St. Rd. Acct. Law*, 22, 23. But see *Belt Ry. Co. v. Banicki*, 102 Ill. App. 642; *Illinois Cent. R. Co. v. Stewart*, 23 Ky. L. Rep. 637, 63 S. W. 596; *Chesapeake, etc., R. Co. v. Board*, 25 Ky. L. R. 1118, 77 S. W. 189; *Chesapeake, etc., R. Co. v. Dodge*, 23 Ky. L. Rep. 1959, 66 S. W. 606.

5. *Cleveland, etc., R. Co. v. Cline*, 111 Ill. App. 416; *Chicago, etc., Transfer R. Co. v. Gruss*, 102 Ill. App. 439, 200 Ill. 195, 65 N. E. 693; *Alabama, etc., R. Co. v. Moorér*, 116 Ala. 642, 22 So. 900, 9 Am. & Eng. R. Cas. N. S. 742.

priority of transportation, etc., is necessarily dependent upon the circumstances and conditions attending each particular case, such as the nature and condition of the goods, the conditions of traffic, the state of the weather, etc.⁶ It is bound to protect the goods it carries from unreasonable hazards, from extrinsic dangers;⁷ to handle with special care fragile goods whose character is indicated on the package;⁸ to exercise due care that goods are not improperly exposed to the elements;⁹ to use reasonable care for the preservation of perishable goods;¹⁰ to exercise reasonable diligence to ascertain early means of forwarding goods to their destination;^{10a} and it is not relieved from its duty or responsibility by the fact that the purpose of the shipper is an unlawful one,¹¹ or that the shipment is made in violation of a statute prohibiting the shipment or unloading of goods on Sunday.¹² Except where the facts are not disputed and but one conclusion can be drawn from them, it is always a question of fact for a jury to determine whether or not the loss or damage is the result of the carrier's negligence.¹³ The primary duty of a common carrier is to ob-

6. *Wibert v. New York, etc., R. Co.*, 12 N. Y. 245; *Tierney v. New York Cent. etc., R. Co.*, 76 N. Y. 305; *Swetland v. Boston, etc., R. Co.*, 102 Mass. 276; *Peet v. Chicago, etc., R. Co.*, 20 Wis. 594; *American Express Co. v. Smith*, 33 Ohio St. 511, 31 Am. Rep. 361; *Illinois Cent. R. Co. v. McClellan*, 54 Ill. 58, 5 Am. Rep. 83; *Cunningham v. Great Northern R. Co.*, 49 L. T. N. S. 394, 16 Am. & Eng. R. Cas. 254.

7. *Tanner v. New York Cent., etc., R. Co.*, 108 N. Y. 623, 32 Am. & Eng. R. Cas. 380.

8. *Hastings v. Pepper*, 11 Pick. (Mass.) 41.

9. *Williams v. Morgan*, 32 La. Ann. 168; *Western, etc., R. Co. v. Exposition Cotton Mills*, 81 Ga. 522, 35 Am. & Eng. R. Cas. 602.

10. *Wing v. New York, etc., R. Co.*, 1 Hilt. (N. Y.) 235.

10a. *McKay v. New York Cent., etc., R. Co.*, 50 Hun (N. Y.) 563, 3 N. Y. Supp. 708.

11. *Waters v. Richmond, etc., R. Co.*, 110 N. C. 338.

12. *Merritt v. Earle*, 29 N. Y. 115, 86 Am. Dec. 292; *Shelton v. Merchants Despatch Transp. Co.*, 59 N. Y. 258, 48 How. Pr. (N. Y.) 257; *Wilde v. Merchants Despatch Transp. Co.*, 47 Iowa, 272.

13. *Tanner v. New York Cent., etc., R. Co.*, 108 N. Y. 623, 32 Am. & Eng. R. Cas. 380, 1 Silv. (N. Y.) 569; *Buck v. Pennsylvania R. Co.*, 150 Pa. St. 170, 30 Am. St. Rep. 800, 61 Am. & Eng. R. Cas. 207; *Udell v. Illinois Cent. R. Co.*, 13 Mo. App. 254; *Witting v. St. Louis, etc., R.*

serve the instructions of the shipper and it is liable for any loss occasioned by its disobeying the shipper's express directions.¹⁴ And it cannot be charged with negligence where it transports and handles goods in the manner directed and according to instructions by the shipper.¹⁵ It is not liable where it carries the goods in the only method practicable under the circumstances and conditions.¹⁶ That goods were carefully and securely packed when delivered to the carrier, and were in a badly damaged condition when received at their destination, raises the inference that they were not transported with ordinary care.¹⁷ On the other hand, evidence is admissible which shows that such injuries were usual to such articles so shipped, in order to prove that the injuries were not caused by the negligence of the carrier.¹⁸ Whether the shipment of goods in open cars or boats is negligent or not is to be determined from all the other circumstances of the case;¹⁹ and the custom of well managed railroads or vessels is admissible to show that such method of transportation is not necessarily negligent.²⁰

Co., 101 Mo. 631, 20 Am. St. Rep. 636, 45 Am. & Eng. R. Cas. 369; *Perishable Freight Transp. Co. v. O'Neill*, 41 Ill. App. 423; *Geo. C. Vagley Elevator Co. v. American Express Co.*, 63 Minn. 142; *Congar v. Galena, etc., R. Co.*, 17 Wis. 477.

14. *Johnson v. New York Cent. R. Co.*, 33 N. Y. 610, 88 Am. Dec. 416; *Pavitt v. Lehigh Valley R. Co.*, 153 Pa. St. 302; *Sager v. Portsmouth, etc., R. Co.*, 31 Me. 228, 50 Am. Dec. 659; *Mellier v. St. Louis, etc., Transp. Co.*, 14 Mo. App. 281.

15. *Ross v. Troy, etc., R. Co.*, 49 Vt. 364, 24 Am. Rep. 144; *Milwaukee v. Chicago, etc., R. Co.*, 37 Wis. 190; *Sloan v. St. Louis, etc., R. Co.*, 53 Mo. 220; *Central R. etc., Co. v. Anderson*, 58 Ga. 393, 16 Am. Ry. Rep.

16. *Burwell v. Raleigh, etc., R. Co.*, 94 N. C. 451, 25 Am. & Eng. R. Cas. 410.

17. *Phoenix Clay Pot Works v. Pittsburgh, etc., R. Co.*, 139 Pa. St. 284, 27 W. N. C. 321, 20 Atl. 1058.

18. *Steele v. Townsend*, 37 Ala. 247, 79 Am. Dec. 49.

19. *Insurance Co. of N. A. v. St. Louis, etc., R. Co.*, 11 Fed. 380, 3 McCrary (U. S.) 233; *Western, etc., R. Co. v. Exposition Cotton Mills*, 81 Ga. 522; *Chevalier v. Patton*, 10 Tex. 344.

20. *Louisville, etc., R. Co. v. Manchester Mills*, 88 Tenn. 653; *Kelton v. Taylor*, 11 Lea (Tenn.) 264, 47 Am. Rep. 284; *Rich v. Lambert*, 12 How. (U. S.) 352; *Clark v. Barnwell*, 12 How. (U. S.) 279.

Where the contract specially provides for shipment in open cars, the carrier is still bound to use all reasonable appliances to prevent loss, and is liable for damages resulting from a failure to do so.²¹ And notice to the consignor of such intended shipment will not relieve the carrier from liability, if actual negligence be shown.²²

§ 2. Negligence must have been proximate cause of injury.

The breach of duty on which an action for loss or injury can be maintained must be the proximate cause of the loss or injury sustained; and the proximate cause of an event is that which, in a natural and continuous sequence, unbroken by any new and independent cause, produces that event and without which that event would not have occurred.²³ As a general rule, the question of proximate cause is for the jury.²⁴

§ 3. Negligence in stowage of goods.

In the case of carriers by water, if due care, skill and diligence are not used in and about the stowage of the cargo, the carrier is liable for the consequences.²⁵ But a loss from stowage is not necessarily a loss from negligence, since it may be necessary in order to

21. *Chicago, etc., R. Co. v. Moss*, 60 Miss. 1003, 45 Am. Rep. 428, 21 Am. & Eng. R. Cas. 98; *Louisville, etc., R. Co. v. Natchez, etc., R. Co.*, 67 Miss. 399, 43 Am. & Eng. R. Cas. 54.

22. *Montgomery, etc., R. Co. v. Edmonds*, 41 Ala. 667; *New Orleans, etc., R. Co. v. Faler*, 58 Miss. 912.

23. *Lowery v. Manhattan Ry. Co.*, 99 N. Y. 158, 1 N. E. 608, 52 Am. Rep. 12; *Hofnagel v. New York Cent., etc., R. Co.*, 55 N. Y. 612; *Cleveland, etc., R. Co. v. Lindsay*, 109 Ill. App. 533; *Cleveland, etc., R. Co. v. Carey*, (Ind. App.) 71 N. E. 244; *Scott v. Allegheny Valley R.*

Co., 172 Pa. St. 646, 37 W. N. C. (Pa.) 458, 33 Atl. 712; *Deming v. Merchants Cotton-Press, etc., Co.*, 90 Tenn. 306; *Martin v. St. Louis, etc., R. Co.*, 55 Ark. 510; *McAllister v. Chicago, etc., R. Co.*, 74 Mo. 351, 4 Am. & Eng. R. Cas. 210. See *Nellis Street Railroad Accident Law*, pp. 24 to 35.

24. *Cox v. London, etc., R. Co.*, 3 F. & F. 77

25. *Nelson v. National Steamship Co.*, 7 Ben. (U. S.) 340; *The Maggie M.*, 30 Fed. 692; *Paturzo v. Compagnie Francaise*, 31 Fed. 611; *The Bitterne*, 35 Fed. 927; *The Glamorganshire*, 50 Fed. 840.

load the ship suitably for her intended voyage to place particular goods in a certain place, or articles whose dangerous character is unknown may be stowed in a usual and safe manner near other goods which are injured by them, without actual fault being imputed to the shipper or the carrier.²⁶ A "clear" bill of lading, or one which is silent as to the place of stowage, imports a contract that the goods are to be stowed under deck, and where the goods are stowed on deck, the carrier is liable, unless it can show that the goods were of a description which by the usage of the particular trade or general commercial usage are properly stowed in that way.²⁷ But, under such a bill of lading, a large coasting steamer carrying cotton between the main and upper decks, enclosed by iron bulwarks and wooden shutters and bulkheads, customarily used for that purpose, is not liable for injury from sea water caused by an unusual storm, which flooded the ship and broke down the bulkhead and shutters.²⁸ What will or will not constitute negligence stowage is generally a question of fact. Evidence of the customary mode of stowage is admissible on this question.²⁹ Where the carrier has no knowledge of and no reason to suspect the dangerous character of the contents of a package, it is not liable for injuries resulting from the explosion of substances delivered to it for transportation, in the absence of proof of negligence on its part.³⁰ It is bound to use the same degree of care that merchants or insurers would exercise in handling such

26. *Pierce v. Winsor*, 2 Cliff. (U. S.) 18.

27. *The Delaware*, 14 Wall. (U. S.) 579; *Sproat v. Donnell*, 26 Me. 185; *Lapham v. Atlas Insurance Co.*, 24 Pick. (Mass.) 1; *Rich v. Lambert*, 12 How. (U. S.) 347.

28. *The William Crane*, 50 Fed. 444.

29. *Paturzo v. Campaigne Francaise*, 31 Fed. 611; *The Chasca*, 23 Fed. 156; *The Invincible*, 1 Lowell (U. S.) 225; *Baxter v. Leland*, 1

Abb. Adm. (U. S.) 348; *The Portuense*, 35 Fed. 670; *Lamb v. Parkman*, 1 Sprague (U. S.) 343.

A vessel is liable for damages to cargo caused by water in the hold, not removed because the pumps were in bad condition, and reasonable care was not taken to ascertain the depth of the water or to remove it by other means. *The Euripides*, 52 Fed. 161.

30. *Nitro-glycerine Case*, 17 Wall. (U. S.) 524.

substances where their dangerous character is known,³¹ but the burden is on the shipper to prove that an explosion was the result of negligence or improper transportation on the part of the carrier.³²

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| 31. <i>White v. Colorado Cent. R. Co.</i> , 5 Dill (U. S.) 428, 3 McCrary (U. S.) 559; <i>Henry v. Cleveland, etc., R. Co.</i> , 67 Fed. 426. | 32. <i>Walker v. Chicago, etc., R. Co.</i> , 71 Iowa, 658, 30 Am. & Eng. R. Cas. 173. * |
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CHAPTER XIII.

CONTRIBUTORY NEGLIGENCE OF SHIPPER.

- SECTION**
1. Contributory negligence of shipper generally.
 2. Defective packing or marking.
 3. Goods improperly loaded.
 4. Liability of shipper or consignee to carrier for negligence in unloading.
 5. Liability of shipper for injury caused by goods of dangerous character.
 6. Goods lost because of defects in cars or appliances furnished by carrier.
 7. Goods lost because of defects in appliances furnished by shipper.

§ 1. Contributory negligence of shipper generally.

A shipper of goods perishable in their nature or susceptible of easy breakage must take extra care in packing and boxing, and a carrier is not liable for injury or damage to goods from insecure or imperfect packing or boxing.¹ A consignor cannot recover for loss of perishable goods shipped in bad condition, even though the carrier's negligence contributed to the loss, unless by ordinary care the former could not have avoided the consequences of the latter's negligence.² Where goods are shipped under a contract between the owner and the carrier by which the owner or his servant are to accompany the property and take care of it, the carrier will not

1. *Goodman v. Oregon R., etc., Co.*, 22 Or. 14, 28 Pac. 894, 59 Am. & Eng. R. Cas. 87; *Shriver v. Sioux City, etc., R. Co.*, 24 Minn. 506, 31 Am. Rep. 353, but it is liable for injuries occurring independently of the defective packing; *Barbour v. South Eastern R. Co.*, 34 L. T. N. S. 67; *Truax v. Philadelphia, etc., R. Co.*, 3 *Houst. (Del.)* 233; *Culbreth v. Philadelphia, etc., R. Co.*, 3 *Houst. (Del.)* 392;

Klauber v. American Express Co., 21 *Wis.* 21, 91 *Am. Dec.* 452.

2. *Reed v. Philadelphia, etc., R. Co.*, 3 *Houst. (Del.)* 176; *American Express Co. v. Smith*, 33 *Ohio St.* 511, 31 *Am. Rep.* 561; *Illinois Cent. R. Co. v. McClellan*, 54 *Ill.* 58, 5 *Am. Rep.* 83; *Baldwin v. London, etc., R. Co.*, 9 *Q. B. Div.* 582, 9 *Am. & Eng. R. Cas.* 175.

incur any liability for the loss of the goods resulting from the shipper's breach of the contract or negligence in its performance.³ The conduct of the shipper will not be held negligent *per se*, unless such negligence is the only inference that can be fairly drawn from the facts.⁴ When the evidence is conflicting as to the negligence of the shipper and as to whether such negligence was the proximate cause of the loss, the questions are properly for the jury.⁵ So, where there is a question as to whether the negligence of the carrier or that of the shipper caused the injury, it is for the jury to say which default was the proximate cause of the loss.⁶ A shipper who in routing a shipment selected a longer route than he could have taken was not guilty of contributory negligence causing injury to the shipment, where the carrier in the exercise of ordinary care could have transported the shipment without damage.⁷ If a fire destroying a car load of high proof spirits was of spontaneous origin, caused by contact with the air, the carrier was not liable therefor where, on delivery of the car to the consignee, it notified his agent that one of the barrels containing the spirits was broken.⁸ While carriers, in the absence of stipulation to the contrary, are insurers of goods intrusted to them for shipment, they will not be so held where loss or damage results from the negligence of the shipper.⁹ In an action for the value of goods and for penalty for refusing to adjust a freight loss claim, the

3. *Hart v. Chicago, etc., R. Co.*, 56 Iowa, 166, 41 Am. Rep. 93, 27 Am. & Eng. R. Cas. 59; *Purcell v. Southern Express Co.*, 34 Ga. 315, 37 Ga. 103, 92 Am. Dec. 53; *Willoughby v. Horridge*, 12 C. B. 742, 74 E. C. L. 742, 17 Jur. 323.

4. *St. Louis, etc., R. Co. v. Philadelphia Fire Assoc.*, 55 Ark. 163, 18 S. W. 43.

5. *Cobb v. Illinois Cent. R. Co.*, 38 Iowa, 601.

6. *Purcell v. Southern Express Co.*, 34 Ga. 315.

7. *Uber v. Chicago, etc., Ry. Co.*, 151 Wis. 431, 138 N. W. 57.

8. *Rothchild Bros. v. Northern Pac. Ry. Co.*, 68 Wash. 527, 123 Pac. 1011.

9. *Currie v. Seaboard Air Line Ry.*, 156 N. C. 432, 72 S. E. 493.

A common carrier is not liable for the loss of goods caused by the shipper's act, whether it be one of negligence or accident. *American Lead Pencil Co. v. Nashville, etc., Ry.*, 124 Tenn. 57, 134 S. W. 613.

fact that the shipment remained in the depot at the destination five days after plaintiff paid the freight charges and signed the waybill does not show contributory negligence, though it might tend to show that the company's liability as a carrier had ceased, and that its liability was only that of a warehouseman.¹⁰ In an action against a railroad company for failure to ship certain seed, plaintiff cannot recover if he was guilty of contributory negligence in exposing the seed to rains, and permitting it to remain so exposed for a period during which rains would likely fall upon it, whereby it would heat and spoil.¹¹ Where a shipper, either before or after shipment, directly or indirectly, intentionally or unintentionally, causes the injury to or destruction of the goods shipped, the carrier is not liable.¹² While a shipper must bear the loss resulting solely from a misdirection of goods, the carrier is liable when guilty of negligence without which, notwithstanding the shipper's mistake, the loss would not have occurred; and, where shipping instructions are not clear, it is the carrier's duty, unless an emergency arises, to hold them and ask further instructions from the shipper.¹³ While ordinarily a common carrier which receives goods for shipment is required to deliver them according to agreement, yet, when the owner accompanies them, the general liability is limited to the extent that the carrier is in no sense liable for any injury or loss that may occur through the act of the owner or through any agency that is under his exclusive control.¹⁴ A common carrier of chattels does not insure them against their own fault or the fault of their owner; nor against damage caused by an inherent defect in the chattels carried, or by a want of care which the owner was bound to exercise.¹⁵ If the owner

10. *Saunders v. Southern Ry. Co.*,
90 S. C. 79, 72 S. E. 637.

11. *Chicago, etc., R. Co. v. Beatty*,
27 Okl. 844, 116 Pac. 171.

12. *Coweta County v. Central of
Ga. Ry. Co.*, 4 Ga. App. 94, 60 S. E.
1018.

13. *Weaver v. Southern Ry. Co.*,
135 Mo. App. 210, 115 S. W. 500.

14. *Nunnelee v. St. Louis, etc., Ry.
Co.*, 145 Mo. App. 17, 129 S. W. 762.

15. *Rixford v. Smith*, 52 N. H. 355,
13 Am. Rep. 42.

of goods accompany them to take care of them, and is himself guilty of negligence, resulting in loss or injury, he cannot recover from the common carrier.¹⁶ Where a contract for the shipment of semi-perishable evaporated apples provided that, if the fruit was not removed by the consignee within twenty-four hours after its arrival at destination, it might be kept in the car at the sole risk of the owner, and the consignee was promptly informed of the arrival of the fruit at its destination, and knew the character of the fruit, the weather conditions, and the provisions of the contract of shipment, but failed to unload the fruit for several days, made no effort to protect it, and did not complain as to its being kept in the car, although fully informed thereof, he was guilty of such negligence as to preclude a recovery from the carrier for injury resulting to the fruit from being left in the car.¹⁷ The fact that a consignee, after discovering the carrier's negligence in failing to transport the goods in a reasonable time, failed to use ordinary care to avoid the injury caused by such negligence, will not preclude him from recovering the damages actually caused to him by such negligence, which he could not, by ordinary diligence, have prevented.¹⁸ Where plaintiff shipped goods consigned to himself at a flag station on defendant's road, where defendant maintained a warehouse, plaintiff was not guilty of laches in that he was not prepared to receive and remove the same until the day following the day on which he received notice of arrival.¹⁹

§ 2. Defective packing or marking.

The fact that an article was not properly packed, when delivered to a common carrier, does not reduce its liability to that of a bailee for hire, or exempt it from making proof that a loss alleged was

16. *Wilson v. Hamilton*, 4 Ohio St. 722.

17. *Becker v. Pennsylvania R. Co.*, 109 App. Div. (N. Y.) 230, 56 N. Y. Supp. 1.

18. *Belcher v. Missouri, etc., R.*

Co. of Texas, 92 Tex. 593, 50 S. W. 559, rev'g judg. (Civ. App.) 47 S. W. 384, 1020.

19. *Normile v. Northern Pac. Ry. Co.*, 36 Wash. 21, 77 Pac. 1087, 67 L. R. A. 271.

not attributable to its negligence.²⁰ Carrying goods in a manifestly unsafe condition is negligence, and where the carrier has failed to exercise its right to refuse to transport goods defectively packed, where the defect is visible, it becomes liable, if the goods are damaged, although partly through the packing; and the defective packing only goes in reduction of damages.²¹ The carrier is not liable for errors or defects in marking or direction by reason of which goods cannot be sent to the right person or destination or may be sent to a wrong person or destination,²² even where the carrier addresses them wrongly by the shipper's direction.²³ But the carrier has a right and it is its duty to refuse to receive the goods, if it knows the address to be insufficient or erroneous, and if it consents to carry them after notice of their imperfect marking, it assumes responsibility for a safe and proper delivery.²⁴ And the carrier should re-mark the goods, if necessary to insure safe delivery, where it has knowledge of the correct address and gives a bill of lading and the goods are imperfectly marked, or it will be responsible for loss or misdelivery.²⁵ So where the defective marking is due to the carrier's fault, or if the marking becomes illegible through its fault.²⁶ But, in such cases, in order

20. *Union Express Co. v. Graham*, 26 Ohio St. 595. See *Van Horn v. Taylor*, 2 La. Ann. 587, 46 Am. Dec. 558; *Nelson v. Stephenson*, 12 N. Y. Super Ct. (5 Duer) 538.

21. *McCarthy v. Louisville, etc., R. Co.*, 102 Ala. 193, 14 So. 370, 48 Am. St. Rep. 29, 61 Am. & Eng. R. Cas. 178; *Higginbotham v. Great Northern R. Co.*, 10 W. R. 358.

22. *Congar v. Chicago, etc., R. Co.*, 24 Wis. 157, 1 Am. Rep. 164; *Stimson v. Jackson*, 58 N. H. 138; *Lake Shore, etc., R. Co. v. Hodapp*, 83 Pa. St. 22, 16 Am. Ry. Rep. 167; *The Huntress*, Fed. Cas. No. 6,914, *Davies* (U. S.) 82; *Southern Express Co. v. Kaufman*, 59 Tenn. (12 Heisk.) 161;

Finn v. Western R. Corp., 102 Mass. 283.

23. *Erie R. Co. v. Wilcox*, 84 Ill. 239, 16 Am. Ry. Rep. 457, 25 Am. Rep. 451.

24. *O'Rourke v. Chicago, etc., R. Co.*, 44 Iowa, 526; *Gulf, etc., R. Co. v. Maetze*, 2 Tex. App. Civ. Cas., § 31, 18 Am. & Eng. R. Cas. 613.

25. *Guillaume v. General Transp. Co.*, 100 N. Y. 491; *Kreuder v. Woolcott*, 1 Hilt. (N. Y.) 223; *Richmond, etc., R. Co. v. Benson*, 86 Ga. 203, 22 Am. St. Rep. 446; *Wright v. Northern Cent. R. Co.*, 8 Phila. (Pa.) 19; *Mahon v. Blake*, 125 Mass. 477.

26. *Meyer v. Chicago, etc., R. Co.*, 24 Wis. 566, 1 Am. Rep. 207; *Foard*

to exonerate the carrier, it is necessary that the negligence of the shipper should contribute to the loss, and whether or not it does is a question of fact for the jury.²⁷ Where the proximate cause of the loss of goods was the negligence of the shipper in marking or packing, the carrier is not responsible.²⁸ A common carrier is not responsible for loss or injury occasioned by bad or imperfect packing, or other carelessness or negligence of the shipper, or for ordinary wear and tear of the goods in the course of transportation.²⁹ In an action for damage to goods while in the hands of a carrier, it is no defense that the goods were delivered to the carrier in insufficient packages, and that the defect was not discoverable, unless the carrier shows that the loss actually resulted from such insufficiency, and though no fault of the carrier.³⁰ The carrier is not excused from liability for loss of oil in a barrel caused by standing it on end, instead of on the bilge in the car, by the fact that the barrel was old and defective.³¹ As to external protection of the goods, the owner is not required to cover them so as to be safe against the action of rain or wind or fire not happening by the act of God.³²

§ 3. Goods improperly loaded.

The carrier is not responsible for loss of or injury to goods occasioned by their being improperly loaded on the cars by the shipper. Where the shipper loaded heavy machinery upon a platform car, and blocked its wheels with insufficient blocking insecurely nailed, by reason whereof the machinery, while being transported by the carrier, broke from its fastenings without fault of

v. Atlantic, etc., R. Co., 8 Jones L. (N. C.) 235, 78 Am. Dec. 277; *Forstythe v. Walker*, 9 Pa. St. 148.

27. *Viner v. New York, etc., R. Co.*, 50 N. Y. 23; *Hutchinson v. Chicago, etc., R. Co.*, 37 Minn. 524, 35 N. W. 433; *Shriver v. Sioux City, etc., R. Co.*, 24 Minn. 506, 31 Am. Rep. 353.

28. *Broadwood v. Southern Express Co.*, 148 Ala. 17, 41 So. 769.

29. *Carpenter v. Baltimore & O. R. Co.*, 6 Pen. (Del.) 15, 64 Atl. 252.

30. *Zerega v. Poppe*, Fed. Cas. No. 18, 213 (Abb. Adm. 397).

31. *Thompson v. Chicago, etc., R. Co.*, 27 Iowa, 561.

32. *Klauber v. American Express Co.*, 21 Wis. 21, 91 Am. Rep. 452.

the carrier in the running of the train, or in the maintenance of the track, and was injured, the carrier was not liable therefor, although its yard master and forwarder of freight cars saw the fastenings, and noticed their insufficiency, before the injury was done.³³ But an answer by a carrier sued by a consignee for a failure to deliver goods which it agreed to transport to him at a certain destination, setting up negligence on the part of the owner and consignor in the mode of loading the goods on the car, is bad where it does not allege that such fault of the owner was the sole cause of the loss of the goods; contributory negligence on the owner's part not being a valid defense.³⁴ Directions given by a shipper of fruit for loading do not preclude a recovery for damages thereto.³⁵ Where a consignor loads freight on a car or packs articles for shipment, the carrier receiving the car as loaded or the package as prepared is not liable for damages arising from a defect in the loading or packing.³⁶ Where a shipper assumes the duty of loading cars for shipment, the carrier is not liable for damages arising from the improper loading of the goods, notwithstanding knowledge of the conductor of the improper loading.³⁷ A carrier is not liable for damages to a wagon caused by its being blown from a platform car during transportation, where the shipper assumed the sole charge and responsibility of loading and fastening the wagon, and there had been a high wind for a sufficient time before the train started to enable him to either further fasten the wagon, or to countermand the order for its shipment.³⁸ Where a shipper

33. *Ross v. Troy, etc., R. Co.*, 49 Vt. 364, 24 Am. Rep. 144. See also *Van Horn v. Taylor*, 2 La. Ann. 587, 46 Am. Dec. 558.

34. *McCarthy v. Louisville, etc., R. Co.*, 102 Ala. 193, 14 So. 370, 48 Am. St. Rep. 29, 61 Am. & Eng. R. Cas. 178. See also *Carriers of live stock*, chap. 18. A witness who properly qualifies himself may give his opinion, in such action, that the cars were "well and carefully loaded." *Id.*

35. *St. Louis S. W. R. Co. of Texas v. Woldert Grocery Co.*, (Tex. Civ. App.) 144 S. W. 1194.

36. *Gulf, etc., Ry. Co. v. Wittnebert*, 101 Tex. 368, 108 S. W. 150, 14 L. R. A. (N. S.) 1227.

37. *International & G. N. R. Co. v. H. P. Drought & Co.* (Tex. Civ. App.) 100 S. W. 1011.

38. *Miltimore v. Chicago & N. W. Ry. Co.*, 37 Wis. 190.

has a side track into his own yard, and loads his shipments himself, the railroad company is not required to inspect the manner of loading every load, regardless of whether the circumstances are such that the railroad company has a right to rely upon an understanding with the shipper as to how the cars are to be loaded.³⁹ If a shipper is negligent in packing a car, and from breakage of certain of the goods a fire originates therein, and if, after knowledge by the carrier of the existence of the fire, the condition is such that the goods may be preserved, or the fire extinguished, by the use of extraordinary care on his part, he will not be relieved from liability, if he is negligent in this regard, by setting up the original negligence of the shipper in loading the car prior to the beginning of the transportation.⁴⁰

§ 4. Liability of shipper or consignee to carrier for negligence in unloading.

A railroad company may recover from a customer to whom it has delivered on a side track a car of lumber safely fastened, for negligence of the latter in leaving it partially unloaded and with the supports removed, in consequence of which the lumber falls or is blown upon the adjacent track, causing injury to an approaching train. The failure of the carrier to keep a watchman at the side track and the fact that the lumber was transported on a flat car and not on a lumber car did not constitute contributory negligence preventing a recovery. In such a case the carrier having no knowledge or notice of the danger, owed no duty whatever to act upon the assumption that the danger might exist, and thus take affirmative measures to protect itself against any wrong which the owner of the goods might inflict upon it.⁴¹

39. *Pennsylvania Co. v. Kenwood Bridge Co.*, 170 Ill. 645, 49 N. E. 215, rev'g judg. 69 Ill. App. 145.

40. *Atlanta & W. P. R. Co. v. Jacobs' Pharmacy Co.*, 135 Ga. 113, 38 S. E. 1039, if the loss of goods during transit was caused by the wrong or

fault of the shipper without negligence of the carrier, the carrier will not be responsible.

41. *New York, etc., R. Co. v. Atlantic Refining Co.*, 129 N. Y. 597, 49 Am. & Eng. R. Cas. 131, revg. 13 N. Y. Supp. 466. See also *Chapman v.*

§ 5. Liability of shipper for injury caused by goods of dangerous character.

One who has in his possession a dangerous article, which he desires to send to another, may send it by a common carrier if it will accept and carry it; but it is his duty to give the carrier notice of its character, so that it may either refuse to take it, or be enabled, if it takes it, to make suitable provisions against danger. The omission to give the carrier such notice is an act of negligence which will render the shipper liable for all damages arising from explosion of the articles shipped, and the carrier will not be presumed to have had knowledge of the nature of the contents of the package where there are no attendant circumstances to arouse its suspicions as to their true character.⁴² The duty does not arise from any contract, express or implied, but from the principle expressed in the maxim, *Sic utere tuo ut alienum non laedas*.⁴³ The principal is liable if the article is shipped by his agent.⁴⁴ The shipper is not liable where the carrier had been informed of the nature of the package either directly or by the marking of the package, even though an employe of the carrier had no knowledge of its dangerous character, if the injury could have been avoided by the exercise of ordinary care and prudence.⁴⁵ Where a contractor of blasting ordered a manufacturer

Atlantic Refining Co., 108 N. Y. 638, 38 Hun (N. Y.) 637.

42. Barney v. Burnstenbinder, 64 Barb. (N. Y.) 212, 7 Lans. (N. Y.) 210; Nitro-glycerine Case, 15 Wall. (U. S.) 524; Boston, etc., R. Co. v. Shanly, 107 Mass. 568, 3 Am. Ry. Rep. 396, 12 Am. L. Reg. N. S. 500; Standard Oil Co. v. Tierney, 92 Ky. 367, 36 Am. St. Rep. 595, 49 Am. & Eng. R. Cas. 117; Herne v. Garton, 2 El. & El. 66, 105 E. C. L. 66, 5 Jur. N. S. 648; Brass v. Maitland, 6 El. & Bl. 471; 88 E. C. L. 471; Farant v. Barnes, 11 C. B. N. S. 557, 103 E. C. L. 557, 8 Jur. N. S. 868.

43. Boston, etc., R. Co. v. Shanly, *supra*; Wellington v. Downer Kerosene Oil Co., 104 Mass. 64; Carter v. Towne, 98 Mass. 567, 96 Am. Dec. 682.

44. Barney v. Burnstenbinder, *supra*; Thomas v. Winchester, 6 N. Y. 397.

45. Standard Oil Co. v. Tierney, (Ky.) 27 S. W. 938, 16 Ky. L. Rep. 327, revg. 92 Ky. 367, 36 Am. St. Rep. 595, 49 Am. & Eng. R. Cas. 117, 17 S. W. 1025, 13 Ky. L. Rep. 626, 11 Ry. & Corp. L. J. 92.

A subsequent change in the manner of branding cannot be proved in

to send him a quantity of dualin, and another to send him certain exploders. Each manufacturer, without the other's knowledge, delivered the respective articles to a carrier, who was ignorant of the danger of combining the two substances, which, while being transported with due care, exploded, injuring the property of the carrier, and the goods of a third party. It was impossible to distinguish what proportion of the explosion was caused by either substance. It was held that the two manufacturers, but not the contractor, were jointly liable in tort, to the carrier and to the third party, and the fact that the omission of the shipper's agent to give notice of the dangerous character of the articles was a criminal or illegal act, did not affect the principal's liability for damages in a civil action.⁴⁶ There is an implied contract on the part of the shipper that his goods are not of such a character as to cause injury, and the knowledge of the agent of the shipper is the knowledge of the principal, although such knowledge must be shown in order to fix liability upon the latter.⁴⁷ In a recent case it has been held that illuminating gas, compressed into steel cylinders of insufficient strength to hold it, though liable to explode by its tendency to expand when heated, is not within the provisions of the United States statutes, forbidding the carriage 'on passenger vessels of camphene, nitro glycerine, benzine, benzola, coal oil, crude or refined petroleum, or "other like explosive burning fluids or like dangerous articles," as the danger lies not in the gas itself, but in the weakness of the vessel containing it.⁴⁸ A shipper of inflammable and explosive acids owes a common-law

an action for negligence in shipping it improperly branded. *Id.*; *Morse v. Minneapolis, etc., R. Co.*, 30 Minn. 465, 11 Am. & Eng. R. Cas. 168; *Lang v. Sanger*, 76 Wis. 71; *Nalley v. Hartford Carpet Co.*, 51 Conn. 524, 50 Am. Rep. 47; *Terre Haute, etc., R. Co. v. Clem*, 123 Ind. 15, 18 Am. St. Rep. 303, 42 Am. & Eng. R. Cas. 229.

46. *Boston, etc., R. Co. v. Shanly, supra*. In the Nitro-glycerine Case, the carrier was held not liable to third parties.

47. *Barney v. Burnstenbinder, supra*; *Jeffrey v. Bigelow*, 13 Wend. (N. Y.) 518.

48. *Russell v. New Jersey Steamboat Co.*, 10 Misc. Rep. (N. Y.) 593, 32 N. Y. Supp. 824.

duty to give notice to the carrier of their nature, in order that they may be so designated on the shipping bill, a failure to perform which relieves the carrier from liability for the loss of the goods due to explosion and fire caused by a portion of the acids leaking from their containers.⁴⁹

§ 6. Goods lost because of defects in cars or appliances furnished by carrier.

It is not the duty of a shipper to inspect a car furnished by a carrier, or to exercise care to know whether the car is in condition; but he may assume that the carrier would not have directed the placing of the goods in the car unless it was suitable.⁵⁰ It is not a part of the implied contract of shipment that a shipper should declare the true weight of an article shipped, and a shipper is not liable for negligence in understating the weight of an article of obvious nature, where an injury occurs because the tackle used in unloading it is insufficient, though adequate for the weight stated.⁵¹ The fact that a shipper packed and shipped apples in November from New York to Minnesota in a box car did not constitute contributory negligence so as to preclude recovery for damages by frost, which defendant railroad company might have prevented by reasonable care.⁵² Where a carrier allowed a consignee to retain exclusive possession of a refrigerator car for the storage of fruit shipped for a consideration, after the relation of carrier and warehouseman had ended by acceptance of goods and payment of freight, the duty did not devolve upon the consignee to repair the car to prevent damage to the fruit.⁵³ Though

49. *Bradley v. Lake Shore & M. S. Co.*, 145 Div. (N. Y.) 312, 129 N. Y. Supp. 1045.

50. *Cleveland, etc., Ry. Co., v. Louisville Tin & Stove Co.*, 33 Ky. Law Rep. 924, 111 S. W. 358.

51. *Hanna v. Pitt & Scott*, 121 App. Div. (N. Y.) 420, 106 N. Y. Supp. 145.

52. *Calender-Vanderhoof Co. v. Chicago, etc., Ry. Co.*, 99 Minn. 295, 109 N. W. 402.

53. *Missouri, etc., Ry. Co. of Texas v. Tripis*, (Tex. Civ. App.) 117 S. W. 199.

In an action by a consignee against a carrier for damages to fruit from defective drain pipes in a refrigerator

a shipper discovers before loading or the departure of the car that it is not suitable for carrying perishable goods, he is not thereby guilty of contributory negligence, or does not assume the risk, if he cannot relieve himself of the situation.⁵⁴ Though a shipper observed the condition of the car when he loaded fruit therein as to insufficient refrigeration, yet if he called the attention of the agent to the condition, and the agent directed him to go ahead and load the fruit, assuring him that the railroad company would furnish the ice, the company would be liable.⁵⁵ Where a carrier furnishes a defective car for shipment, it is liable for injuries to the shipment resulting from such defect, although the shipper inspected the car and knew of the defect.⁵⁶ Where the shippers of fruit undertook to supply the refrigerator car with ice, the carrier had a right to assume, except as facts may have existed that put it on notice to the contrary, that the shippers had furnished enough ice to keep the car cool until a delivery to the consignee could be had in the ordinary course of business.⁵⁷ But where a bill of lading for the shipment of fruit provided that the cars should be iced at G., and re-iced as often as necessary thereafter, the fact that plaintiffs discovered that the cars were insufficiently iced before their departure did not impose a responsibility on plaintiffs or relieve defendant, if plaintiffs had no opportunity to remedy the situation, and believed that the fruit would reach G. without injury.⁵⁸

car used by plaintiff for storage after the relation of carrier and warehouseman had terminated, where it appeared that, if the fruit had been removed from the car, it would have spoiled immediately because the consignee had no cold-storage facilities, the consignee would not be negligent in failing to do so. *Id.*

54. *Missouri, etc., R. Co. of Texas v. McLean*, (Tex. Civ. App.) 118 S. W. 161.

55. *Southern Ry. Co. v. Williams*, 139 Ga. 357, 77 S. E. 153.

56. *St. Louis, etc., R. Co. v. Marshall*, 74 Ark. 597, 86 S. W. 802.

57. *Chicago, etc., Ry. Co. v. Reymann*, — Ind. —, 73 N. E. 587, *rev'd* 166 Ind. 278, 76 N. E. 970.

58. *Johnson v. Toledo, etc., Ry. Co.*, 133 Mich. 596, 10 Detroit Leg. N. 324, 95 N. W. 724, 103 Am. St. Rep. 464.

§ 7. Goods lost because of defects in appliances furnished by shipper.

Where the owner of a hogshead of molasses furnished a common carrier with skids wherewith to unload the same from his wagon, but the skids, owing to a latent defect, broke under the weight of the hogshead, and the contents thereof were lost, the owner could not maintain an action against the carrier for the loss.⁵⁹

**59. Loveland v. Burke, 120 Mass.
139, 21 Am. Rep. 507.**

CHAPTER XIV.

PRESUMPTIONS AND BURDEN OF PROOF.

- SECTION** 1. Presumptions and burden of proof generally.
2. Presumption as to state of goods when received.
3. Defense of loss by the act of God.*
4. Where goods lost consist of several kinds.
5. Where liability is limited by special contract.
6. Proof of loss by fire under contract limiting liability.
7. Where carrier is merely a warehouseman.

§ 1. Presumptions and burden of proof generally.

In an action against a carrier for loss of or injury to goods the burden rests upon the plaintiff to show by affirmative proof the delivery of the goods to the carrier, their nature and condition, and that they were in fact in good order when received by the carrier.¹ There is no presumption that the goods were in good order when received by the carrier.² The receipt of the carrier for the goods as being "in apparent good order" raises no presumption whatever against the carrier as to the actual condition of the goods when received, and does not relieve the plaintiff of the burden of showing such condition, and that the goods were in fact in good order when received by the carrier. Such words in a receipt

1. *Smith v. New York Cent. R. Co.*, 43 Barb. (N. Y.) 225, *affd.* 41 N. Y. 620; *Hoffberg v. Bumford*, 88 N. Y. Supp. 950; *Canfield v. Baltimore, etc., R. Co.*, 46 N. Y. Super. Ct. 238; *Louisville, etc., R. Co. v. Echols*, 97 Ala. 556; *Reubens v. Ludgate Hill Steamship Co.*, 20 N. Y. Supp. 481; *Wing v. New York, etc., R. Co.*, 1 Hilt. (N. Y.) 235; *Peebles v. Boston, etc., R. Co.*, 112 Mass. 498; *Missouri Pac. R. Co. v. Douglass*, 2 Tex.

App. Civ. Cas., § 28, 16 Am. & Eng. R. Cas. 98.

Delivery of the whole of a consignment may be presumed from the delivery of a part. *Union Pacific R. Co. v. Hepner*, 3 Colo. App. 313; *Savannah, etc., R. Co. v. Steininger*, 84 Ga. 579.

2. *Brooks v. Dinsmore*, 3 St. Rep. (N. Y.) 587; *Lake Shore Nitro-glycerine Co. v. Illinois Cent. R. Co.*, 75 Ill. 394; *Marquette, etc., R. Co. v.*

by the carrier refer only to the outward appearance of the package.³ The burden of proof is also on the plaintiff to show by affirmative evidence non-delivery or a failure of the carrier to deliver them at their destination in good order.⁴ When there has been a loss or injury of goods in shipment by the carrier, such proof is sufficient to establish a *prima facie* case against the carrier, and, in the absence of a contract limiting its liability, the burden of proof is then upon the carrier to show affirmatively that the loss or injury resulted from a cause for which it was not responsible, such as the act of God or the public enemy;⁵ or that the shipment was

Kirkwood, 45 Mich. 51, 40 Am. Rep. 453. See *Rice v. Indianapolis, etc.*, R. Co., 3 Mo. App. 27. Compare *Breed v. Mitchell*, 48 Ga. 533.

3. *Thyll v. New York, etc., R. Co.*, 92 App. Div. (N. Y.) 513, 87 N. Y. Supp. 345, mod'g 84 N. Y. Supp. 175; *Miller v. Hannibal, etc., R. Co.*, 90 N. Y. 430, 43 Am. Rep. 179; *Clark v. Barnell*, 12 How. (U. S.) 272, 13 L. Ed. 985; *Roth v. Hamburg-American Packet Co.*, 59 N. Y. Super. Ct. 49; *St. Louis, etc., R. Co. v. Neel*, 56 Ark. 279; *Chicago, etc., R. Co. v. Benjamin*, 63 Ill. 283; *Burwell v. Raleigh, etc., R. Co.*, 94 N. C. 451; *Gulf, etc., R. Co. v. Holder*, 10 Tex. Civ. App. 223.

4. *Blum v. Monahan*, 36 Misc. Rep. (N. Y.) 179, 73 N. Y. Supp. 162; *Roberts v. Chittenden*, 88 N. Y. 33; *Mouton v. Louisville, etc., R. Co.*, (Ala.) 29 So. 601; *Chicago, etc., R. Co. v. Dickinson*, 74 Ill. 249; *Chicago, etc., R. Co. v. Provine*, 61 Miss. 288; *Day v. Ridley*, 16 Vt. 48; *Hot Springs R. Co. v. Hudgins*, 42 Ark. 485, plaintiff is relieved from this necessity where the carrier pleads non-receipt of the goods; *Ingledew v. Northern R. Co.*, 7 Gray (Mass.) 86

Armstrong v. Chicago, etc., R. Co., 62 Mo. App. 639; *Galveston, etc., R. Co. v. Gildea*, 2 Tex. App. Civ. Cas., § 271.

5. N. Y.—*Park v. Preston*, 108 N. Y. 434; *Bowden v. Fargo*, 2 Misc. Rep. (N. Y.) 551; *Colt v. McMechen*, 6 Johns. (N. Y.) 160, 5 Am. Dec. 200; *Campe v. Weir*, 28 Misc. Rep. (N. Y.) 243, 58 N. Y. Supp. 1082; *Reiser v. Metropolitan Express Co.*, 91 N. Y. Supp. 170; *Rind v. Stake*, 28 Misc. Rep. (N. Y.) 177, 59 N. Y. Supp. 42; *Lockwood v. Manhattan, etc., Warehouse Co.*, 28 App. Div. (N. Y.) 68, 50 N. Y. Supp. 974; *Westcott v. Fargo*, 63 Barb. (N. Y.) 349; *Canfield v. Baltimore, etc., R. Co.*, 93 N. Y. 532, 45 Am. Rep. 268, 16 Am. & Eng. R. Cas. 162, holding "the law to have been settled beyond controversy that proof of the non-delivery of property by a bailee upon demand, unexplained, makes out a *prima facie* case of negligence against such bailee in the care and custody of the thing bailed, and, in the absence of any evidence on his part, excusing such non-delivery, presents a question of fact as to the negligence of the bailee for the consideration of the jury. Steers

such that it was only liable for negligence, as that the goods were

v. Liverpool, etc., Steamship Co., 57 N. Y. 6, 15 Am. Rep. 453; *Magnin v. Dinsmore*, 56 N. Y. 168; *Burnell v. New York Cent. R. Co.*, 45 N. Y. 185, 6 Am. Rep. 61; *Fairfax v. New York Cent., etc., R. Co.*, 67 N. Y. 11; *Clafin v. Meyer*, 75 N. Y. 260, 31 Am. Rep. 467; *Schmidt v. Blood*, 9 Wend. (N. Y.) 268, 24 Am. Dec. 143; *Moore v. Evans*, 14 Barb. (N. Y.) 524. The principle upon which this rule is founded embraces as well the case of a partial as of a total failure to deliver the subject of a bailment." See also *Place v. Union Express Co.*, 2 Hilt (N. Y.) 19, applying the rule in an action for delay in delivery.

U. S.—*Cumming v. Barracouta*, 40 Fed. 498; *Western Mfg. Co. v. The Guiding Star*, 37 Fed. 641; *Woodward v. Illinois Cent. R. Co.*, 1 Biss. (U. S.) 403; *The Samuel E. Spring*, 29 Fed. 397.

Ala.—*Mouton v. Louisville, etc., R. Co.*, (Ala.) 29 So. 602; *Richmond, etc., R. Co. v. Grousdale*, 99 Ala. 389; *Alabama G. S. R. Co. v. Little*, 71 Ala. 611; *South, etc., Alabama R. Co. v. Wood*, 66 Ala. 167.

Cal.—*Wilson v. California Cent. R. Co.*, 94 Cal. 166.

Conn.—*Mears v. New York, etc., R. Co.*, (Conn.) 52 Atl. 610, 56 L. R. A. 884; *Boies v. Hartford, etc., R. Co.*, 37 Conn. 272.

Fla.—*Savannah, etc., R. Co. v. Harris*, 26 Fla. 148.

Ga.—*Georgia R., etc., Co. v. Reener*, 93 Ga. 808; *Purcell v. Southern Express Co.*, 34 Ga. 315; *Central R. Co. v. Hasselkus*, 91 Ga. 382.

Ill.—*Chesapeake, etc., R. Co. v. Radbourne*, 52 Ill. App. 203.

Ind.—*Pennsylvania Co. v. Livright*, 14 Ind. App. 518.

Iowa.—*Winne v. Illinois Cent. R. Co.*, 31 Iowa, 583; *Angle v. Mississippi, etc., R. Co.*, 18 Iowa, 555; *St. Clair v. Chicago, etc., R. Co.*, 80 Iowa, 304, delay in delivery.

La.—*Chapman v. New Orleans, etc., R. Co.*, 21 La. Ann. 224; *Tardos v. Toulon*, 14 La. Ann. 429.

Me.—*Dow v. Portland Steam Packet Co.*, 84 Me. 490; *Bennett v. American Express Co.*, 83 Me. 236; *Little v. Boston, etc., R. Co.*, 66 Me. 239.

Mass.—*Alden v. Pearson*, 3 Gray (Mass.) 342.

Minn.—*Boehl v. Chicago, etc., R. Co.*, 44 Minn. 191; *Hull v. Chicago, etc., R. Co.*, 41 Minn. 510; *Smith v. St. Paul City R. Co.*, 32 Minn. 1.

Mo.—*George v. Chicago, etc., R. Co.*, 57 Mo. App. 358; *Heck v. Missouri Pac. R. So.*, 51 Mo. App. 532; *Hance v. Pacific Express Co.*, 48 Mo. App. 179; *Davis v. Wabash, etc., R. Co.*, 89 Mo. 340; *Buddy v. Wabash, etc., R. Co.*, 20 Mo. App. 206; *Green v. Indianapolis, etc., R. Co.*, 56 Mo. 556; *Degge v. American Express Co.*, 2 Mo. App. Rep. 904.

N. H.—*Hall v. Cheney*, 36 N. H. 26.

N. J.—*Hunt v. Morris*, 12 N. J. L. 175.

Pa.—*Buck v. Pennsylvania R. Co.*, 150 Pa. St. 170; *Grogan v. Adams Express Co.*, 114 Pa. St. 523; *Adams Express Co. v. Holmes*, (Pa.) 9 Atl. 166; *New York Cent., etc., R. Co. v. Eby*, (Pa.) 12 Atl. 482; *Pennsylvania*

perishable or were live stock.⁶ There is no presumption of negligence arising from the mere fact of loss or injury, and when the carrier has made such proofs as to the cause of the loss or injury, the burden is on the plaintiff to show that the carrier's negligence was the proximate cause of the loss.⁷ But when property has been delivered in good condition to a carrier, and it has been damaged while in possession of the carrier, nothing else appearing, the presumption is that there has been negligence on the part of the carrier, and the burden is on the carrier to remove such pre-

R. Co. v. Miller, 87 Pa. St. 395, Em.
pire Transp. Co. v. Wamsutta Oil
Refining, etc., Co., 63 Pa. St. 14;
Phoenix Clay Pot Works v. Pitts-
burgh, etc., R. Co., 139 Pa. St. 284;
American Express Co. v. Sands, 55
Pa. St. 140; Clark v. Spencer, 10
Watts (Pa.) 335.

S. C.—*Johnstone v. Richmond, etc.*,
R. Co., 39 S. C. 55; *Wardlaw v. South*
Carolina R. Co., 11 Rich. L. (S. C.)
337; *Ewart v. Street*, 2 Bailey L. (S.
C.) 157.

Tenn.—*Nashville, etc., R. Co. v.*
Stone & Haslett, (Tenn.) 79 S. W.
1031; *Louisville, etc., R. Co. v. Wynn*,
88 Tenn. 320; *Merchants Despatch*
Transp. Co. v. Bloch, 86 Tenn. 392;
Turney v. Wilson, 7 Yerg. (Tenn.)
340; *Deming v. Merchants Cotton*
Press, etc., 90 Tenn. 306.

Tex.—*St. Louis, etc., R. Co. v.*
Martin, (Tex. Civ. App.) 35 S. W.
28; *St. Louis, etc., R. Co. v. Par-*
mer, (Tex. Civ. App.) 30 S. W. 1109;
Missouri Pac. R. Co. v. Scott, 4 Tex.
Civ. App. 76; *Texas, etc., R. Co. v.*
Ryan v. Missouri, etc., R. Co., 65 Tex.
13; *Missouri Pac. R. Co. v. China*
Mfg. Co., 79 Tex. 26.

Va.—*Murphy v. Staton*, 3 Mulf.
(Va.) 239.

Vt.—*Mann v. Birchard*, 40 Vt. 326,
delay in delivery.

Wis.—*Browning v. Goodrich*
Transp. Co., 78 Wis. 391; *Black v.*
Goodrich Transp. Co., 55 Wis. 319;
Kirst v. Milwaukee, etc., R. Co., 46
Wis. 489.

Eng.—*Riley v. Horne*, 5 Bing. 217,
15 E. C. L. 422.

Can.—*Henry v. Canadian Pac. R.*
Co., 1 Manitoba 210.

6. See *Carriers of Live Stock*, chap.
21.

7 *The Guiding Star*, 53 Fed. 936;
Pittsburgh, etc., R. Co. v. Hazen, 84
Ill. 36; *Terre Haute, etc., R. Co. v.*
Sherwood, 132 Ind. 129; *Pittsburgh,*
etc., R. Co. v. Hollowell, 65 Ind. 188;
Jordan v. American Express Co., 86
Me. 225; *E. O. Stannard Milling Co.*
v. White Line Cent. Transit Co., 122
Mo. 258; *Cleveland, etc., R. Co. v.*
Crawford, 24 Ohio St. 631; *Buck v.*
Pennsylvania R. Co., 150 Pa. St. 170;
Pennsylvania R. Co. v. Raiordon, 119
Pa. St. 577; *East Tennessee, etc., R.*
Co. v. Stewart, 13 Lea (Tenn.) 432.

sumption.⁸ Where, in an action against a railroad company to recover for a case of plate glass, broken while in its possession as a carrier, the evidence disclosed that the case, with several other like cases, was delivered to defendant for transportation, in good order, and that the other cases were delivered by the carrier in good order, as received, it will be presumed that it was negligently handled by defendant.⁹ Negligence on the part of a carrier undertaking to transport heavy castings is shown by the fact that they were shipped in good order and were found cracked upon delivery, and the carrier, to avoid liability, has the burden of showing cause for the fracture which will overcome the presumptive case raised against him.¹⁰ The destruction of goods while in the hands of an express company by the derailment and burning of the car on which they were shipped gives rise to a presumption of negligence.¹¹ But under a count asking recovery against a railroad company as a voluntary bailee of goods which were destroyed before delivery to the consignee, the burden of proof was on the plaintiff to show the negligence averred.¹² Where a carrier, instead of delivering a trunk at the port as required by its contract, without giving the owner an opportunity to examine or take charge

8. *Pennsylvania R. Co. v. Naive*, (Tenn.) 79 S. W. 124.

9. *Hutkoff v. Pennsylvania R. Co.*, 29 Misc. Rep. (N. Y.) 770, 61 N. Y. Supp. 254. Citing *Campe v. Weir*, 28 Misc. Rep. (N. Y.) 243, 58 N. Y. Supp. 1082; *Roth v. Hamburg Amer. Packet Co.*, 12 N. Y. Supp. 462; *Trimble v. New York Cent., etc., R. Co.*, 39 App. Div. (N. Y.) 403, 412, 57 N. Y. Supp. 437.

10. *Hudson River Lighterage Co. v. Wheeler Condenser & E. Co.*, 93 Fed. 374. Citing *Phoenix Pot Works v. Pittsburgh, etc., R. Co.*, 139 Pa. St. 284; *Ketchum v. American Merchants Union Exp. Co.*, 52 Mo. 390;

Grieve v. Illinois C. R. Co., 104 Iowa 659, 74 N. W. 192; *Terre Haute, etc., R. Co. v. Sherwood*, 132 Ind. 129, 17 L. R. A. 339; *Hinton v. Eastern R. Co.*, (Minn.) 75 N. W. 373; *Hull v. Chicago, etc., R. Co.*, 41 Minn. 510, 5 L. R. A. 587; *Shriver v. Sioux City, etc., R. Co.*, 24 Minn. 506; *Alabama, etc., R. Co. v. Little*, 71 Ala. 611, 12 Am. & Eng. R. Cas. 37; *Rintoul v. New York, etc., R. Co.*, 17 Fed. 905, 16 Am. & Eng. R. Cas. 144.

11. *Powers Mercantile Co. v. Wells, Fargo & Co.*, (Minn.) 100 N. W. 735.

12. *Frederick v. Louisville, etc., R. Co.*, 133 Ala. 486, 31 So. 968.

of it for the purpose of entry, sent it to the custom house, and, after entry and release, forwarded it by an express company to the owner's address, it had the burden of showing that a loss therefrom did not occur while it was in its actual custody.¹³ It may be presumed in case of a decay in perishable goods in transit by reason of negligence on the part of the carrier, that such negligence occurred while the goods were in the custody of the last carrier.¹⁴ The burden of proof is on the carrier to show that a shipper assented to its billing goods to a place other than that specified in the shipping receipt.¹⁵ The burden of proof is on the plaintiff to show that defendant is a common carrier.¹⁶ Where plaintiff in an action against a railroad company to recover for a loss of goods in shipment, introduces evidence which tends strongly to show inferentially that defendant managed and controlled the line of road upon which the loss occurred, although it was owned by a separate corporation, such as that the managing officers of the two companies were the same, that defendant held itself out to the public as operating the line by advertising it as a part of its system, etc., and defendant, although having it within its power, fails to produce evidence to show the actual relation between the two companies, it is a reasonable presumption that such evidence would support plaintiff's contention, and the jury is justified in determining the issue in favor of the plaintiff.¹⁷

§ 2. Presumption as to state of goods when received.

If goods are delivered by a carrier in a damaged state, it will

13. *Fasy v. International Nav. Co.*, 177 N. Y. 591, 70 N. E. 1098, affg. 77 App. Div. (N. Y.) 469, 79 N. Y. Supp. 1103.

14. *Densmore Commission Co. v. Duluth, etc., R. Co.*, 101 Wis. 563, 77 N. W. 904.

15. *Cleveland, etc., R. Co. v. C. & A. Potts & Co.*, (Ind. App.) 71 N. E. 635.

16. *Ringgold v. Haven*, 1 Cal. 108

Morrison v. Davis, 20 Pa. St. 171; *Doty v. Strong*, 1 Pin. (Wis.) 313; *Missouri Pac. R. Co. v. Douglass*, 2 Tex. App. Civ. Cas., § 28. See *Denver, etc., R. Co. v. Cahill*, 8 Colo. App. 158, allegation and proof not necessary where railroads are made common carriers by statute.

17. *Pennsylvania R. Co. v. Anoka Nat. Bank*, 108 Fed. 482, 47 C. C. A. 454.

not be liable unless it is shown that they were in a different state when they were received by it. The presumption, if any, would be that the goods were received in the same condition as when they were delivered.¹⁸ The burden of proof is, as we have seen, on the shipper to show a delivery to the carrier in good order.¹⁹ It has, however, been held that the burden is on the carrier to show as a defence that, when delivered to it, the goods were in a damaged condition, or that the injury occurred from a cause for which it was not liable.²⁰

§ 3. Defense of loss by act of God.

The carrier is always liable for a loss or injury resulting from its own negligence; and when that intervenes, it cannot discharge itself by showing that it was occasioned by one of those occurrences which are termed the act of God. If by its negligence, property committed to it is brought under the operation of natural causes that work its destruction, or is exposed to such cause of loss, it is responsible. So also, if but for its neglect the loss or injury would have been avoided. The rule is the same in reference to an act of the public enemy. The burden of proof is on the carrier, therefore, to show not only that an act of God or of the public enemy was the immediate and proximate cause of the loss or injury, but also that it actually exercised the requisite care and diligence to protect the goods from the operation of such causes.²¹ But it has been held that where it is shown that a loss of goods in the possession of a

18. *Goodman v. Oregon R., etc.*, Co., 22 Or. 14, 49 Am. & Eng. R. Cas. 87; *Missouri Pac. R. Co. v. Breeding*, 4 Tex. App. Civ. Cas., § 154.

19. See § 1, *ante*.

20. *Montgomery, etc., R. Co. v. Moore*, 51 Ala. 394.

21. *Michaels v. New York Cent. R. Co.*, 30 N. Y. 564, 86 Am. Dec. 415; *Montgomery, etc., R. Co. v. Moore*, 51 Ala. 394; *Agnew v. Steamer*

Contra Costa, 27 Cal. 425; *Jackson v. Sacramento Val. R. Co.*, 23 Cal. 269; *Central R. Co. v. Hasselkus*, 91 Ga. 382; *Richmond, etc., R. Co. v. White*, 88 Ga. 805; *Van Winkle v. South Carolina R. Co.*, 38 Ga. 32; *Davis v. Wabash, etc., R. Co.*, 89 Mo. 340; *Leonard v. Hendrickson*, 18 Pa. St. 40; *Bell v. Reed*, 4 Binn. (Pa.) 127, 5 Am. Dec. 398.

carrier was due to an overpowering cause, the burden is on the opposite party to establish the negligence of the carrier.²²

§ 4. Where goods lost consist of several kinds.

Where a shipment consists of several kinds of goods of different values, a portion of which is lost, and the proof is not definite as to the proportion of each that was shipped, there is no legal presumption in such a case, but it is purely a question of fact, from the evidence, as to which kind of goods were destroyed, the burden of proof being on the plaintiff, and an instruction that the presumption is that all goods lost, the kind and value of which is not proven, must have been those of the least value, is erroneous.²³ The plaintiff has the burden of proof to establish the value of goods lost, and in the absence of such proof a judgment in his favor cannot stand.²⁴

§ 5. Where liability is limited by special contract.

Where goods are received for transportation by a common carrier, under a special contract by which its common law liability as insurer is limited, it is held by the weight of authority that, the carrier having proved the loss to have occurred by reason of the excepted cause, it then devolves upon the shipper to establish the negligence of the carrier, failing in which he cannot recover.²⁵ On

22. *Jones v. Minneapolis, etc., R. Co.*, (Minn.) 97 N. W. 893.

23. *Lake Shore Nitro-glycerine Co. v. Illinois Cent. R. Co.*, 75 Ill. 394.

24. *Houston, etc., R. Co. v. McGlossom*, 1 Tex. App. Civ. Cas., § 224.

25. *N. Y.—Canfield v. Baltimore, etc., R. Co.*, 93 N. Y. 532, 45 Am. Rep. 268; *Whitworth v. Erie R. Co.*, 87 N. Y. 413; *Steers v. Liverpool, etc., Steamship Co.*, 57 N. Y. 1, 15 Am. Rep. 458; *Oochran v. Dinsmore*, 49 N. Y. 249; *Lamb v. Camden, etc. Co.*, 46 N. Y. 271, 7 Am. Rep. 327;

French v. Buffalo, etc., R. Co., 4 Keyes (N. Y.) 108; *Sutro v. Fargo*, 41 N. Y. Super. Ct. 231.

U. S.—The Jefferson, 31 Fed. 489; *The New Orleans*, 26 Fed. 44; *Clark v. Barnwell*, 12 How. (U. S.) 272; *Western Transp. Co. v. Downer*, 11 Wall. (U. S.) 133; *Wertheimer v. Pennsylvania R. Co.*, 17 Blatchf. (U. S.) 421; *Van Schaack v. Northern Transp. Co.*, 3 Biss. (U. S.) 394; *Speyer v. The Mary Belle Roberts*, 2 Sawy. (U. S.) 1.

Ark.—Little Rock, etc., R. Co. v. Harper, 44 Ark. 208; *Little Rock,*

the other hand, it is held in a number of jurisdictions that, under such contracts, the burden is upon the carrier to show not only that the loss was by the excepted cause, but also that it itself was free from fault.²⁶ The reason why the carrier should not be

etc., R. Co. v. Corcoran, 40 Ark. 375; Little Rock, *etc.*, R. Co. v. Talbot, 39 Ark. 523.

Iowa.—Mitchell v. United States Express Co., 46 Iowa, 214.

Ind.—Indianapolis, *etc.*, R. Co. v. Forsythe, 4 Ind. App. 326.

Kan.—Kansas Pac. R. Co. v. Reynolds, 8 Kan. 623; Kallman v. United States Express Co., 3 Kan. 205.

La.—New Orleans Mut. Int. Co. v. New Orleans, *etc.*, R. Co., 20 La. Ann. 302; Kelham v. Steamship Kensington, 24 La. Ann. 100; Kirk v. Folsom, 23 La. Ann. 584; Price v. The Uriel, 10 La. Ann. 413.

Me.—Sager v. Portsmouth, *etc.*, R. Co., 31 Me. 228.

Md.—Bankard v. Baltimore, *etc.*, R. Co., 34 Md. 197.

Mo.—Otis Co. v. Missouri Pac. R. Co., 112 Mo. 622; Read v. St. Louis, *etc.*, R. Co., 60 Mo. 199; Harvey v. Terre Haute, *etc.*, 74 Mo. 538; Hance v. Pacific Express Co., 48 Mo. App. 179; Witting v. St. Louis, *etc.*, R. Co., 28 Mo. App. 103; Heil v. St. Louis, *etc.*, R. Co., 16 Mo. App. 363.

N. C.—Smith v. North Carolina R. Co., 64 N. C. 235.

Pa.—Buck v. Pennsylvania R. Co., 150 Pa. St. 170; Pennsylvania R. Co. v. Raiordon, 119 Pa. St. 577; Colton v. Cleveland, *etc.*, R. Co., 67 Pa. St. 211; Patterson v. Clyde, 67 Pa. St. 505; Farnham v. Camden, *etc.*, R. Co., 55 Pa. St. 53.

Plaintiff in an action against a railroad company for injury to per-

ishable property by heating has the burden of proving negligence, or circumstances from which negligence may be reasonably inferred, where the contract of shipment releases the liability from any causes incident to transportation, such as "heating," not directly traceable to the negligence of its servants. Davenport v. Pennsylvania R. Co., 10 Pa. Super. Ct. 47.

Tenn.—Louisville, *etc.*, R. Co. v. Manchester Mills, 88 Tenn. 656.

Eng.—Harris v. Packwood, 3 Taunt. 264.

26. *Ala.*—McCarthy v. Louisville, *etc.*, R. Co., 102 Ala. 193; Louisville, *etc.*, R. Co. v. Touart, 97 Ala. 514; East Tennessee, *etc.*, R. Co. v. Johnston, 75 Ala. 596; Alabama G. S. R. Co. v. Little, 71 Ala. 611; Grey v. Mobile Co., 55 Ala. 387; Steele v. Townsend, 37 Ala. 247.

Conn.—Harper v. Railroad Co., 37 Conn. 272.

Ga.—Richmond, *etc.*, R. Co. v. White, 88 Ga. 805; Columbus, *etc.*, R. Co. v. Kennedy, 78 Ga. 646; Berry v. Cooper, 28 Ga. 543.

Ill.—Dunspeth v. Wade, 3 Ill. 285.

Minn.—Shea v. Minneapolis, *etc.*, R. Co., 63 Minn. 228; Hull v. Chicago, *etc.*, R. Co., 41 Minn. 510; Shriver v. Sioux City, *etc.*, R. Co., 24 Minn. 506.

Miss.—Southern Express Co. v. Seide, 67 Miss. 613; Chicago, *etc.*, R. Co. v. Moss, 60 Miss. 1003.

Ohio.—Pennsylvania Co. v. Yoder,

required to prove the absence of negligence on its part was in some cases stated to be that the special agreement relieves the carrier from all liability, except that of a bailee for hire,²⁷ but that ground has been held untenable by subsequent cases.²⁸ It is now generally put upon the ground that to require it would limit the restriction and destroy its chief purpose and, in effect, amount to holding that the carrier might not limit its liability, by practically casting upon it the burden of proof in every case.²⁹ On the other hand it is claimed that the duty of the carrier to prove the absence of negligence on its part arises from the terms of the contract, from the character of its occupation, and from the rule of evidence requiring the facts, even of a negative averment, to be proved by the party within whose knowledge they peculiarly lie.³⁰ The burden of proof is on the carrier to show the special contract and that the loss was one within the exemptions of its provisions.³¹

25 Ohio Cir. Ct. R. 32; United States Express Co. v. Blackman, 28 Ohio St. 144; Erie R. Co. v. Lockwood, 28 Ohio St. 358; Gaines v. Union Transp., etc., Co., 28 Ohio St. 418; Union Express Co. v. Graham, 26 Ohio St. 595; Graham v. Davis, 4 Ohio St. 362; Fatman v. Cincinnati, etc., R. Co., 2 Disney (Ohio), 248; Union Mut. Ins. Co. v. Indianapolis, etc., R. Co., 1 Disney (Ohio) 480.

S. C.—Johnstone v. Richmond, etc., R. Co., 39 S. C. 55; Wallingford v. Columbia, etc., R. Co., 26 S. C. 258; Baker v. Brinson, 9 Rich. L. (S. C.) 201; Swindler v. Hilliard, 2 Rich. L. (S. C.) 286.

Tex.—Missouri Pac. R. Co. v. China Mfg. Co., 79 Tex. 26; Ryan v. Missouri, etc., R. Co., 65 Tex. 13; St. Louis, etc., R. Co. v. Martin, (Tex. Civ. App.) 35 S. W. 23.

W. Va.—Brown v. Adams Express Co., 15 W. Va. 812.

27. Lamb v. Camden, etc., Co., 46 N. Y. 271; York Co. v. Central Railroad, 3 Wall. (U. S.) 107.

28. Erie R. Co. v. Lockwood, 28 Ohio St. 358.

29. Patterson v. Clyde, 67 Pa. St. 505; Phoenix Clay Pot Works v. Pittsburgh, etc., R. Co., 139 Pa. St. 284; New Jersey Steam Nav. Co. v. Merchants Bank, 6 How. (U. S.) 384.

30. Chicago, etc., R. Co. v. Moss, 60 Miss. 1003; Richmond, etc., R. Co. v. White, 88 Ga. 805; 1 Greenleaf on Ev. (14th Ed.), § 79.

31. *U. S.*—Hooper v. Rathbone, Taney's Dec. (U. S.) 519; Western R. Co. v. Harwell, 91 Ala. 340; Western Transp. Co. v. Newhall, 24 Ill. 466; Terre Haute, etc., R. Co. v. Sherwood, 132 Ind. 129; Fillebrown

§ 6. Proof of loss by fire under contract limiting liability.

A shipper or consignee of goods under a contract relieving the carrier from liability for loss or damage by fire from any cause to the property in transit, or in deposit or places of trans-shipment, or at depots or landings at point of delivery, has the burden of proving that the loss or damage by fire was the result of the carrier's negligence and of showing facts taking the case out of the operation of the exemption clause.* The occurrence of a fire while the goods were in the possession of the carrier does not alone justify the inference of negligence. In the absence of all explanation of the origin of the fire, or of evidence tending to show that it was in the power of the carrier to have made such explanation, or that, by the exercise of reasonable care, the fire would not have occurred, no presumption of negligence is raised so as to justify the submission of the question to the jury.³² In some

v. Grand Trunk R. Co., 55 Mo. 462; Baltimore, etc., R. Co. v. Brady, 32 Md. 333; McMillan v. Michigan Southern, etc., R. Co., 16 Mich. 79; Lindsley v. Chicago, etc., R. Co., 36 Minn. 539; Johnson v. Alabama, etc., R. Co., 69 Miss. 191; Wolf v. American Express Co., 43 Mo. 421; United States Express Co. v. Backman, 28 Ohio St. 144; Schaeffer v. Philadelphia, etc., R. Co., 168 Pa. St. 209; Slater v. South Carolina R. Co., 29 S. C. 96; Falvey v. Northern Transp. Co., 15 Wis. 129.

32. Draper v. Delaware, etc., Canal Co., 118 N. Y. 123; Van Akin v. Erie R. Co., 92 App. Div. (N. Y.) 23, 87 N. Y. Supp. 871; Platt v. Richmond, etc., R. Co., 108 N. Y. 358, 32 Am. & Eng. R. Cas. 517; Whitworth v. Erie R. Co., 87 N. Y. 413, 6 Am. & Eng. R. Cas. 352; Caldwell v. New Jersey Steamboat Co., 57 N. Y. 282; Germania Fire Ins. Co. v. Memphis, etc., R. Co., 72 N.

Y. 90, 28 Am. Rep. 113; Lamb v. Camden, etc., R. Co., 46 N. Y. 271, 7 Am. Rep. 327; Cochran v. Dinsmore, 49 N. Y. 249; Sutro v. Fargo, 41 N. Y. Super. Ct. 241; Insurance Co. of N. A. v. Lake Erie, etc., R. Co., 152 Ind. 333, 4 Chic. L. J. Wkly. 201, 1 Repr. 819, 53 N. E. 382; Clark v. Barnwell, 12 How. (U. S.) 272, 13 L. Ed. 985; Western Transp. Co. v. Downer, 11 Wall. (U. S.) 129, 20 L. Ed. 160; Farnham v. Camden, etc., R. Co., 55 Pa. St. 53; Colton v. Cleveland, etc., R. Co., 67 Pa. St. 211; Patterson v. Clyde, 67 Pa. St. 500; Pennsylvania R. Co. v. Raiordon, 119 Pa. St. 577; Buck v. Pennsylvania R. Co., 150 Pa. St. 170, 24 Atl. 678; Smith v. American Express Co., 108 Mich. 572, 66 N. W. 479; Read v. St. Louis, etc., R. Co., 60 Mo. 199; Kallman v. United States Express Co., 3 Kan. 205; New Orleans Mut. Ins. Co. v. New Orleans, etc., R. Co., 20 La. Ann. 302; Wilson

jurisdictions the contrary doctrine is held that the burden is on the carrier to show absence of negligence in case of loss or injury from a cause within the contract provision for exemption.³³

§ 7. When carrier is merely a warehouseman.

Where the carrier's responsibility is that of a warehouseman merely, it is liable only for losses caused by its negligence, and mere proof of loss or injury is not sufficient to render it liable. For example, if the plaintiff in an action against a railroad company to recover the value of goods deposited in its depot, and alleged to have been lost through its neglect, proves simply that the goods were stolen from the depot, and fails to offer any evidence

v. Southern Pac. R. Co., 62 Cal. 164, 7 Am. & Eng. R. Cas. 400; *Louisville, etc., R. Co. v. Manchester Mills*, 88 Penn. 653, 14 S. W. 314; *Sager v. Portsmouth, etc., R. Co.*, 31 Me. 228, 50 Am. Dec. 659; *Mitchell v. United States Express Co.*, 46 Iowa, 214; *Kansas Pac. R. Co. v. Reynolds*, 8 Kan. 623; *Smith v. North Carolina R. Co.*, 64 N. C. 235; *Little Rock, etc., R. Co. v. Talbot*, 39 Ark. 523; *Harris v. Packwood*, 3 Taunt. 264; *Muddle v. Stride*, 9 Car. & P. 380.

33. *Hinton v. Eastern R. Co.*, 72 Minn. 339, 75 N. W. 373, 11 Am. & Eng. R. Cas. N. S. 125; *Shea v. Minneapolis, etc., R. Co.*, 63 Minn. 228, 65 N. W. 458; *Southard v. Minneapolis, etc., R. Co.*, 60 Minn. 392, 62 N. W. 442, 619; *Hull v. Chicago, etc., R. Co.*, 41 Minn. 510, 5 L. R. A. 587, 43 N. W. 391; *Newport News, etc., R. Co. v. Holmes*, 14 Ky. L. Rep. 853; *Newberger Cotton Co. v. Illinois Cent. R. Co.*, 75 Miss. 303, 23 So. 186; *Mitchell v. Carolina O. R. Co.*, 124 N. C. 236, 44 L. R. A. 515, 32 S. E. 671; *Graham v. Davis*, 4 Ohio St. 362, 62 Am. Dec. 285;

Union Express Co. v. Graham, 26 Ohio St. 595; *United States Express Co. v. Bachman*, 28 Ohio St. 144; *Erie R. Co. v. Lockwood*, 28 Ohio St. 358; *Gaines v. Union Transp. Ins. Co.*, 28 Ohio St. 418; *Wallingford v. Columbia, etc., R. Co.*, 26 S. C. 258, 2 S. E. 19; *Texas, etc., R. Co. v. Payne*, 15 Tex. Civ. App. 58, 38 S. W. 366; *Galveston, etc., R. Co. v. Efron*, (Tex. Civ. App.) 38 S. W. 639; *Ryan v. Missouri, etc., R. Co.*, 65 Tex. 13, 57 Am. Rep. 589; *Missouri Pac. R. Co. v. China Mfg. Co.*, 79 Tex. 26, 14 S. W. 785; *Gulf, etc., R. Co. v. Zimmerman*, 81 Tex. 605; *Wardlaw v. South Carolina R. Co.*, 11 Rich. L. (S. C.) 337; *The Isaac Reed*, 82 Fed. 566; *The Kensington*, 88 Fed. 331; *Mackenzie v. Cox*, 9 C. P. 632, 38 E. C. L. 263; *Louisville, etc., R. Co. v. Cowherd*, 120 Ala. 51, 23 So. 793; *Houston, etc., R. Co. v. Bath*, 17 Tex. Civ. App. 697, 44 S. W. 595; *Selma, etc., R. Co. v. United States*, 139 U. S. 560, 35 L. Ed. 266; *Chicago, etc., R. Co. v. Moss*, 60 Minn. 1003, 45 Am. Rep. 428.

of a want of ordinary care on the part of the company, the court may properly rule that the evidence is insufficient to maintain the action.³⁴ A *prima facie* case of negligence is made out against a warehouseman who refuses to deliver property stored with him, upon proof of demand and refusal. Upon such proof alone, the burden is on him to account for the property, otherwise he shall be deemed to have converted it to his own use.³⁵ But if it appears that the property, when demanded, had been consumed by fire, the burden of proof is then on the bailor to show that the fire was the result of the negligence of the warehouseman.³⁶

34. *Lamb v. Western R. Corp.*, 7 Allen (Mass.) '98.

35. *Wilson v. Southern Pac. R. Co.*, 62 Cal. 164, 7 Am. & Eng. R. Cas. 400, 9 Am. & Eng. R. Cas. 161; *Boies*

v. Hartford, etc., R. Co., 37 Conn., 273, 9 Am. Rep. 347.

36. *Wilson v. Southern Pac. R. Co.*, *supra*; *Browne v. Johnson*, 29 Tex. 43; *Harris v. Packwood*, 3 Taunt. 264.

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